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On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking

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On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking

BY KAREN E. BRAVO*

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[T]he traffickers, they make you believe that they're the only one on your side. And then when you're arrested a time or two you discover that,

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well, really your [trafficker] is the only one on your side. It's really hard to go to the police as safe people when you're being arrested by them.¹

Jaime picks tomatoes in Northern Indiana farm fields. He was recruited by a local agent in the rural environs of his small Guatemala village. Captivated by promises of high hourly wages and legal entry and stay status in the United States, he and his extended family pooled their money together to pay the recruiter's fees. In Indiana, his passport has been secured for safekeeping by the farm boss; he is required to perform back-breaking field work for 14 or more hours a day, including weekends; is incurring debts for his food and board; and has not been given a regular accounting of either his hours worked or the extent of his debts. Jaime has not left the farm since his arrival, except when accompanied by the supervisor and the other workers on food shopping trips to the local supercenter. Some state officials came by to inspect the filthy lodgings that were allocated for the migrant workers' use. They interviewed Jaime and the other workers in the presence of the bosses. Everyone said they were satisfied and happy with their compensation and work conditions.²

Dolores, an undocumented Mexican immigrant whose husband had paid for her to join him in Chicago, is trafficked into sexual slavery in Arizona by her coyote. Her traffickers warn her that, if she escapes, the police will send her back to Mexico. If she speaks to her "clients" about her true situation, her parents' and siblings' location is known to her captors. She only needs to "work off" her additional debt to them, and she will be released to join her husband in Chicago. After two months' confinement, Dolores escapes, but is picked up by the police. Unable to prove her identity or that she has legal immigrant status, Dolores is detained and turned over to Homeland Security. Dolores, not even sure of the location where she had been held, does not speak of her experiences for fear that the traffickers will harm her family in Mexico. She is deported to Mexico a few months after her arrest. Her husband is saving up for a second attempt to have her join him in Chicago. To local and federal law enforcement, and to officials within the Department of Homeland Security, Dolores was a criminal alien who has broken the law and threatened U.S. border and national security.³

1. *Tell Me More: Authorities: Superbowl Draws Pimps, Child Prostitutes* (PBS radio broadcast Feb. 2, 2011) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=133439415>). This quote is from Jessica Richardson, who is a domestic trafficking victim.

2. Inspired by the narratives in Southern Poverty Law Center, *Close to Slavery*, available at http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf.

3. Dolores is a hypothetical victim of human trafficking whose plight is never recognized by the legal system. She is not identified as a victim, and her traffickers are never caught or punished for their crimes against her. For discussion of a similar case. See Dina Haynes, *(Not) Found Chained in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337

[In response to immigration, the United States has] obstructed minorities from voting; required Latinos to present papers if the police ask for them; opposed the Dream Act, which would have conferred citizenship on young immigrants who served in our armed forces or went to college; and called for denying the constitutional right to citizenship to American-born children of undocumented immigrants.⁴

The excerpts and hypotheticals above demonstrate that the interaction of legal status, societal perceptions, and the power conferred by legal doctrines and structures are integrally related to human trafficking.

I. INTRODUCTION

Focusing on human trafficking, this article is my first foray into addressing the role played by legal constructions of personhood in creating the preconditions of exploitation of vulnerable groups and individuals. I claim that the legal disabilities to which some human beings are subjected—through exclusion of these groups and individuals from the society’s protections—create an inferior legal personality—a quasi-personhood—that invites victimization such as human trafficking. And, once an individual is subjected to that victimization, the imposition of legal disabilities and the resulting quasi-personhood prevent and/or make difficult or impossible their escape from those situations.⁵

A. HUMAN TRAFFICKING

In the last decades of the twentieth century, trafficking in human beings, characterized as “modern day slavery,” emerged fully as an issue of global concern. According to the U.S. State Department’s 2010 Trafficking in Persons Report, more than 170 of the world’s countries have a significant trafficking problem and are countries of destination, origin, and/or transit.⁶ The trafficker in human beings controls the trafficked individual through physical force or coercion, and/or the application of psychological forms of

(2006-07) (describing and analyzing the difficulties victims confront as law enforcement and other sources of state authority fail to “recognize” them).

4. Harold Meyerson, *The GOP’s Anti-immigrant Stance Could Turn Texas into a Blue State*, THE WASH. POST, March 2, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030105589.html>.

5. See TELL ME MORE, *supra* note 1.

6. UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 47 (2010). Pursuant to Congressional mandate, the U.S. State Department produces an annual report on human trafficking worldwide. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C. §§ 7101–7112 (2000)) at §§ 7106(e)(3)(A), (B).

compulsion in order to extract services, and/or to trade the trafficked individual, rather than through legal *ownership*.⁷ The trafficked human is bought and sold, and services, *i.e.*, sexual or other types of labor, are extracted from that human being with no compensation, or only token compensation.⁸

Trafficked humans are most often portrayed as women and children who come from economically vulnerable countries and territories, are burdened with more vulnerable socioeconomic statuses, and/or come from disadvantaged regions, and/or groups within individual countries.⁹ In previous publications, I have urged analysis of the economic bases of human trafficking and have advocated a market- and trade-based attack on the trade.¹⁰ My research has led me to examine the ways in which legal structures and doctrines, such as the ways in which personhood is constructed and stratified, contribute to the human-to-human exploitation of trafficking in humans.

B. PERSONHOOD

The concept or term “person” is ubiquitous in the legal literature.¹¹ It is used to delineate the legal personality of actors within the society, *i.e.*,

7. Karen E. Bravo, *Follow the Money? Does the International Fight Against Money Laundering Provide a Model for International Anti-Human Trafficking Efforts?*, 6 U. ST. THOMAS L.J. 138, 143 (2008).

8. *Id.*

9. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 12 (2006) (illustrative table comparing victim profiles shows that women and children constitute the majority of trafficking victims).

10. *See, e.g.*, Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 TRANSNAT'L LAW & CONTEMP. PROBS. 545 (2009) [hereafter, *Free Labor*].

11. For example, the term “person” is used in the definitions of “human trafficking” adopted in each of the U.S. Trafficking Victims Protection Act and the United Nations Trafficking Protocol. 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.” Under the Act, “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.

Trafficking Victims Protection Act § 7101 (emphasis added). The UN Trafficking Protocol defines trafficking as

their rights and obligations, and to further the policies and ideals of the state and polity. Today, against a backdrop of legal recognition of international human rights,¹² some humans are subjected to the assignment of a lesser or quasi-personhood. The gap between the entities recognized as “persons” and the rights recognized in and enforced on their behalf often contrasts with the physical existence, basic needs, and legal rights of human beings.¹³ In such cases, the society’s and legal system’s protective impulse becomes transformed and hardened into the legal system’s facilitation of exploitation.¹⁴

While the concept of personhood is deployed and manipulated by courts and legislatures to give and withhold rights to groups and individuals, there is little consistency in the use of the term.¹⁵ Who is a “person?” How does the law construct this term? Are prisoners,¹⁶ ex-convicts, legal immigrants, undocumented migrants, and/or trafficked individuals persons or *quasi*-persons under contemporary law?

[T]he 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.

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, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter Trafficking Protocol], Art. 3 (emphasis added).

12. For example, the Universal Declaration of Human Rights has been ratified by all member states of the United Nations.

13. For example, corporate entities’ Constitutional free speech rights include the ability to spend to influence elections. *See* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010). Humans who have been convicted of felonies may be forever deprived of the right to vote in elections; *see also* Erwin Chemerinsky, *The Constitution and Punishment*, 2004 *Stanford L. Rev.* 1049 (identifying and contrasting the inconsistencies in Supreme Court jurisprudence with respect to the punishments (including the death penalty) imposed on human individuals versus judicial resistance to the imposition of punitive damages that may be asserted against corporate entities).

14. *Free Labor*, *supra* note 10, at 545, 586-87. For example, the immigrant is made vulnerable through exclusion from the more privileged status of “citizen-national.” *See also* Kevin Johnson, “*Aliens*” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 *U. MIAMI INTER-AM. L. REV.* 263, 264-65 (1996-1997).

15. *See, e.g., Note, What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 *HARV. L. REV.*, 1745, 1746 (2001) [hereafter, *Talk About Persons*] (“[n]o coherent body of doctrine or jurisprudential theory exists regarding [personhood]”).

16. *See* *Tell Me More: Freed Prisoner Picks Up Journalism Award*, Broadcast May 9, 2011, transcripts available at <http://www.npr.org/2011/05/09/136139497/freed-prisoner-picks-up-journalism-award> (Walter Rideau describes the sexual enslavement and prostitution of some prisoners by other prisoners, with the tacit approval of prison authorities).

In *Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, I stated that: “In the slave societies of the era of the trans-Atlantic slave trade, the slave was a quasi-person, the attributes of personhood serving the interests and profit-seeking of the slave society.”¹⁷ I further noted that:

In modern societies and states, crouched defensively against the influx of would-be migrants, *states have begun to withhold the attributes of full personhood* from those who have either entered their borders illegally or, having entered legally, have remained past the legally mandated limit of their stay. [For example, t]he immigration laws employed by the United States . . . serve to facilitate and enforce enslavement and subjugation of economically vulnerable people. State immigration laws, and their domestic and international enforcement, function in effect like the “patterollers” and Black Codes of the American South.¹⁸

Personhood, despite various proposed definitions, is a concept that elicits great debate, as there are diverse interpretations of the legal status, i.e., personhood, of various entities, including embryos and animals,¹⁹ or the rights and responsibilities of corporations and nations, as well as of the attributes of human beings. As conceptualized in this article, the recognition of personhood encompasses concepts of liberty, equal rights, autonomy, and dignity, as expressed in individual societies through the protections enshrined in legal instruments. The possessors of such attributes, who are able to enforce the recognition of the full array of rights, are “persons.” Those who enjoy only a subset of those rights are quasi-persons or non-persons within those societies.

The quasi-personhood crafted in prior eras has mutated to a more subtle legal quasi-personhood, which enshrines racial, economic, and other forms of subordination. While contemporary laws may prohibit *de jure* enslavement and slavery, current legal doctrines and practices may facilitate the *de facto* slavery-like exploitation,²⁰ including trafficking, of vulnerable groups and individuals. In the United States, for example, the legal person-

17. 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, 291 (2007).

18. *Id.* at 291-292 (emphasis added, citations omitted).

19. See, e.g., Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L. J. 369, 387-92, 402-05 (2007).

20. See, e.g., Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599 (2007) (arguing that the U.S. criminal justice system has re-enslaved African-American males).

hood of immigrants, documented and undocumented, has been steadily chipped away under immigration laws.²¹ Legal mechanisms of subordination, among others, facilitate the international and domestic traffic in human beings.

This article identifies and critically examines the role of the law in constructing personhood, and the impact of such construction on the trafficking of human beings. Part II discusses the concept of personhood generally, and the construction of the attributes of that personhood under U.S. domestic law and international human rights law. Part III identifies and examines some policy reasons for, and mechanisms utilized in, constructing, recognizing, and/or enforcing attributes of personhood, as well as enhancements or limitations on that protection. Part IV analyzes the ways in which quasi-personhood may result, so as to facilitate the exploitation, including human trafficking, of certain groups and individuals. Part V concludes that a holistic approach to and recognition of different mechanisms and spheres of legal construction of personhood will more effectively protect such groups and individuals, and further the protective interests of the society.

II. WHAT IS A PERSON?

You may be born a biological human being, but are you a person?

The law plays an integral role in creating, recognizing, and enforcing personhood: whether through the enunciation of enforceable rights in domestic and international instruments;²² through prohibitions on the exercise of fundamental rights by identified groups and/or individuals;²³ through subjection of certain groups to greater scrutiny by public officials;²⁴ or through recognition of legal personhood in artificial entities,²⁵ the legal system constructs legal personality within societies. The structures, attributes, and disabilities imposed by the law on various groups and individuals interact with cultural, moral, ethical, and other forces in the society to either strengthen or weaken the targeted entities' status.

21. See MEYERSON, *supra* note **Error! Bookmark not defined.**

22. See, e.g., the Bill of Rights of the Constitution of the United States; U.S. CONST. amend. I-X.

23. For example, several states of the United States eliminate the right to vote of either or both incarcerated and post-incarceration felons. See, e.g., JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 72-94 (2006).

24. For example, Arizona's 2010 anti-immigrant statute requires law enforcement officials to subject individuals to added scrutiny (i.e., documentary proof of lawful presence) if law enforcement officers reasonably believe that the individuals may not be lawfully present in the United States.

25. See *infra* Part III.B.5 for discussion of corporate entities.

This article assumes that personhood should facilitate all beneficial activities and potential of the human being – the full flourishing of the human individual. The analysis conducted herein does not attempt to give a definitive answer to the question of the inherence and/or pre-existence of personhood: that is, whether personhood exists apart from the law, such that the law merely *encapsulates*,²⁶ in words and enforcement mechanisms the prior existence of certain rights and attributes of different entities;²⁷ or whether the law *creates* such rights and attributes, to which cultural, economic, and political forces then add further layers of meaning. Instead, this article takes the position that the law plays an interactive role, shaping the contours of personhood while itself shaping and being shaped by forces within individual societies and across transnational communities.

A. INTRODUCTION

What qualities are essential to personhood? Who or what is a person? There is no universal definition of “person” or “personhood.”²⁸ Indeed, in legal discourse and instruments, the term is not always used even as attributes of personhood are granted or withheld. As used in this article, personhood, and the status of person, means the legal recognition of the rights, duties, and obligations (including, for example, human rights and civil rights) that enable access to the full range of human potential of individuals and groups in a given society. Recognition (or non-recognition) and enforcement (or lack of enforcement) of such rights by the legal system interact with economic, social, cultural, and political forces such that it is not solely the legal personality of affected groups and individuals that is

26. That is, re-stating the already recognized.

27. Such as the rights of human beings under a natural law theory. See, e.g., Michael Boylan, *Are There Natural Human Rights*, N.Y. TIMES, May 29, 2011 (discussing various theories of the origins, existence, and contours of human rights).

28. See, e.g., Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights*, 105 COLUM. L. REV. 209, 213 (2005) (“Descartes famously conceived the notion of persons as the union of body and soul, and fundamentally, the union of two kinds of substance: *res extensa* and *res cogitans*. This union distinguished persons from mere animals (machines lacking souls) . . . [John] Locke too thought of a person as a “thinking intelligent being”). That is, potential answers vary, depending on the area of study, the era, and the philosophical inclinations of the respondent. Others have described a person in the naturalistic view of one that is born, and accordingly “persons are simply biological organisms of sufficient complexity that we can attribute psychological as well as physical characteristics to them.” *Id.* at 214. This may beg the question of whether a cat who desires a saucer of milk would fit under this definition. Ohlin himself advocates a “cluster concept” of personhood. *Id.* at 229–33.

shaped and constructed; those factors also affect their capacity to function as equals within a society.²⁹

The difficulties of defining the term reflect the swirling intermixture of the following questions, among others: Are, and should, all human beings be persons? I.e., should personhood and humanity overlap completely? And how should juridical—i.e., artificial—persons be distinguished from human persons? Should they be? Should personhood be constructed to promote equality of status and access within individual societies (and across transnational communities)? And what does that mean: That is, how does equality operate, and how is it implemented? Does it signify a right to all the tools and benefits of the law?

I acknowledge the intense difficulty (or impossibility!) of defining or attempting to constrain the content and significance of the personhood concept or term. Indeed, according to legal scholar, Jens David Ohlin, “[e]ven within philosophy, personhood does not have a settled meaning but is the site of intense metaphysical disagreement.”³⁰ The intensity of the difficulty is centered in the multi-varied use of the term, and its grounding across different fields, areas of study, and philosophies,³¹ as well as its use as part of, and the understanding of the concept in, everyday life. According to Ohlin:

In our daily lives, when we have no difficulty picking out persons from nonpersons, the individual components of the cluster [of personhood] are consistent with each other, i.e., there is no conflict between them. But . . . legal controversies . . . demonstrate that the law is rife with cases where the components of the cluster pull in opposite directions.³²

However, I might demand more clarity from Ohlin’s characterization above. In everyday life, it *is* easy to recognize the existence and/or presence of a biological human being, but it may be impossible, without further investigation, to ascertain that biological human’s legal non-personhood or

29. JOEL M. CHARON, *SYMBOLIC INTERACTIONISM: AN INTRODUCTION, AN INTERPRETATION, AN INTEGRATION*, 156-163, 218-20 (Prentice-Hall, 5th ed. 1995) (describing the interactive formation of individual identity within social contexts). Charon demonstrates that the individual does not stand alone – societal perceptions and transmission of those perceptions contributes to and, indeed, shapes the identity. *Id.* at 163. Similarly, law shapes and legally defines the identity of individuals and groups within and across societies. The law may demand subordination and/or may give permission to exploit.

30. Ohlin, *supra* note 28, at 213.

31. *Id.* at 214 (“The meaning of the term is so difficult to nail down because it straddles not only metaphysics, biology, and religion, but also value theory, such as moral philosophy and the law.”).

32. *Id.* at 230.

quasi-personhood in particular contexts. That is, while the biological human may exist, his/her rights may have been withdrawn or temporarily withheld by operation of law, so that s/he may be unable to assert and/or enforce the society's recognition of his/her existence or right to participate in the society. The withdrawal of the right to participate may include deeply fundamental rights and functions enjoyed by other, more privileged members of that society.³³

In the absence of the ability or the time to investigate the legal status of all individuals encountered in quotidian social and other interactions, short cuts become useful, and thus the norm, such that age, race, gender, and/or perceived socio-economic status are used as proxies for the determination of the personhood, quasi-personhood or non-personhood of biological human individuals.

Despite the difficulties of definition, the concept of personhood continues to be used and useful because “[it] is a talisman that confers status, respect, and moral worth, and for this reason the concept is deeply ingrained in legal discourse in general and in human rights in particular.”³⁴ As Ohlin observes, “[r]ights are usually ascribed to *human beings* or *persons* because these categories are valid bearers of moral interests; indeed, this pattern of reasoning is frequently invoked in domestic case law, the scholarly literature on rights, and international instruments such as the Universal Declaration of Human Rights.”³⁵

B. PERSONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Beginning from the understanding that human beings are the most easily recognizable “persons,” and are, perhaps, the “first” or “quintessential persons,”³⁶ I explore here some fundamental rights recognized in humans beings pursuant to international instruments and international law.

Most scholars assume that, whatever is meant by “personhood,” it is a pre-requisite for making a human rights claim.³⁷ The broad sweep of international human rights is enshrined in the United Nations’ December 1948 Universal Declaration of Human Rights.³⁸ The core principles which the

33. See discussion Part III *infra*. Examples include the withholding of post-incarceration voting rights from ex-convicts, even though they have paid their debts to society.

34. Ohlin, *supra* note 28, at 211.

35. *Id.*

36. See, e.g., *Talk About Persons*, *supra* note 15, at 1745 (discussing “the commonplace understanding of what it means to be a person – that all humans are persons and all persons are humans”).

37. Ohlin, *supra* note 28, at 212.

38. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Declaration promotes include universality, equality and non-discrimination, and the notion that human rights simultaneously entail both rights and obligations from duty bearers and rights holders.³⁹ Article 1 of the Universal Declaration of Human Rights specifies the basis for claiming the rights. It states: “All *humans* are born free and equal in dignity and rights. They are endowed with reason and conscience”⁴⁰

The use of the words “all humans” is repeated throughout the rest of the Declaration or used interchangeably with words like “everyone” or “no one.”⁴¹ “Humanity” thus provides the contours of the basic assumption of the Declaration about the right to liberty and equality as the birthright of human beings that cannot be alienated. Further, because humans are rational and moral beings, that thinking, moralizing, philosophizing biological entity is different from other creatures on earth and therefore entitled to certain rights and freedoms which other creatures may not enjoy.

In Article 6, the Declaration provides that “*Everyone has the right to recognition everywhere as a person before the law.*”⁴² The Declaration’s

39. *Id.* The Declaration therefore is a unit of measurement by which to measure the degree of respect for, and compliance with, international human rights standards worldwide. The Declaration provides for the right to Freedom from Discrimination; Right to Life, Liberty, Personal Security; Freedom from Slavery; Freedom from Torture and Degrading Treatment; Right to Equality before the Law; Right to Remedy by Competent Tribunal; Freedom from Arbitrary Arrest and Exile; Right to Fair Public Hearing; Right to be Considered Innocent until Proven Guilty; Freedom from Interference with Privacy, Family, Home and Correspondence; Right to Free Movement in and out of the Country; Right to Asylum in other Countries from Persecution; Right to a Nationality and the Freedom to Change It; Right to Marriage and Family; Right to Own Property; Freedom of Belief and Religion; Freedom of Opinion and Information; Right of Peaceful Assembly and Association; and the Right to Participate in Government and in Free Elections. The rights listed above, enshrined in the Universal Declaration and the Covenant on Economic Social and Cultural Rights and the Covenant on Civil and Political Rights, are referred to as the first generation of human rights. *Id.*, *passim*.

40. *Id.*, Article 1. These concepts have been reiterated in numerous international human rights conventions, declarations, and resolutions, as other core treaties or conventions have their foundation in the Universal Declaration. *See, e.g.*, International Covenant on Civil and Political Rights preamble, Dec. 19, 1966, 1976 U.N.T.S. 172:

The States Parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person.

Id.

41. *See, e.g.*, Articles 4 through 9 of the Universal Declaration of Human Rights (using the language of “everyone” and “no one”).

42. U.N. G.A. Res. 217, *supra* note 25 (emphasis added). This language is restated verbatim in the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights art. 16, Dec. 19, 1966, 1976 U.N.T.S. 177.

invocation of the right to *legal personhood* for all humans indicates the integral role played by the law in preserving and enforcing the rights explicitly formulated in the other provisions of the Declaration. However, the Declaration defines “person” under international human rights law only through a reading of the various articles, and through tracing the words used in the Preamble and the first Article of the Declaration. Based on such a reading, it is clear that the “person” being referred to in the instrument is a human being.

C. PERSONS UNDER U.S. DOMESTIC LAW

The malleability of the concept of personhood in U.S. domestic law has been evident since the founding of the republic. Both the terms “person” (referring to individuals) and “people” (the collectivity of the American people, i.e., citizens) are used throughout the U.S. Constitution to refer to human beings.⁴³ However, the term is disaggregated and fractionated in different provisions of the instrument so that it is used to refer to any individual human being, as well as to slaves, aliens, and voting men.

1. *Constitutional Persons*

For reasons of political expedience to create the union, using the language of “persons” as a synonym for “slave,” in the Apportionment Clause, the Framers distinguished between full and two-thirds persons (enslaved Africans);⁴⁴ in the Slave Trade Clause protected the right to continue to import enslaved Africans until 1808;⁴⁵ and in the Fugitive Slave Clause ordered the return of fugitive enslaved blacks to their owners.⁴⁶

43. See U.S. CONST. pmb. (“We the People . . . establish this Constitution.”) The word People in the Constitution originally meant collectively the free landowning citizens with the right to vote. AKHIL REED AMAR, *THE BILL OF RIGHTS* 171 (2000). At the writing of the Constitution these people were only white men, not free blacks or white women. However, through later amendments the people came to mean collectively all citizens. See *infra* Part II.C.1.

44. See U.S. CONST. art. I, § 2, cl. 3.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of *free persons*, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of *all other Persons*.

Id. (emphasis added).

45. See U.S. CONST. art. I, § 9, cl. 1.

The Migration or Importation of *such Persons* as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax

The U.S. Constitution was rescued from the twilight of the Great Compromise⁴⁷ by the post-Civil War Fourteenth Amendment, which proclaimed all persons born or naturalized in the United States and subject to the jurisdiction thereof to be citizens of the United States and of the state wherein they reside. According to legal scholar, Akhil Amar:

The [14th] amendment aimed to provide an unimpeachable legal foundation for the earlier statute, making clear that everyone born under the American flag—black or white, rich or poor, male or female, Jew or Gentile—was a free and equal citizen The amendment also made clear that non-native, naturalized Americans were entitled to claim the privileges of citizenship [A] state would no longer enjoy *carte blanche* to designate some (that is, whites) as “citizens” and to treat others (free blacks) as lesser “inhabitants.”⁴⁸

Amar further claims that:

By incorporating the rights of the Fifth Amendment, the privileges-or-immunities clause, under the precedent of *Dred Scott*, would have prevented states from depriving “citizens” of due process. [The writers of the 14th amendment] wanted to go even further by extending the benefits of state due process to aliens.⁴⁹

This is the reason that “persons” is used in this clause instead of “citizens.”⁵⁰ It was considered essential that all present within the United States,

or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Id. (emphasis added).

46. See U.S. CONST. art. 4, § 2, cl. 3.

No *Person* held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the party to whom such Service or Labour may be due.

Id. (emphasis added).

47. See Derrick Bell, *Prologue: The Chronicle of the Constitutional Contradiction*, THE DERRICK BELL READER 17-22 (Richard Delgado & Jean Stefancik eds., 2005). See also Paul Finkelman, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3-36 (2001) (discussing the debate about slavery and the slave trade at the Constitutional Convention and the resulting “dirty compromise”).

48. AKHIL REED AMAR, AMERICA’S CONSTITUTION 381 (2006).

49. AKHIL REED AMAR, BILL OF RIGHTS 172 (2000).

50. *Id.*

whether citizens or strangers, should have equal protection in every state within the United States in the rights of life and liberty and property.⁵¹ The expansion of the Constitution-based recognition and enforcement of personhood in a broader group of human beings is reflected in the Bill of Rights and in our understanding of it. While the original Bill of Rights focused primarily on empowering the people collectively against government agents following their own agenda,⁵² “[t]he Fourteenth Amendment, by contrast, focused on protecting minorities against even responsive, representative, majoritarian government.”⁵³ According to Amar, “[t]he complementary phrase in the 1866 amendment—‘privileges or immunities of citizens’—indicates a subtle but real shift of emphasis, reflecting a vision more liberal than republican, more individualist than collectivist, more private than public, more negative than positive.”⁵⁴ The privileges-or-immunities clause spoke of all citizens including women and children.⁵⁵ This is made clear by the phrase “all persons born or naturalized in the United States.”⁵⁶

The Fourteenth Amendment appeared to transform the Constitution’s recognition of legal personhood from the fractionated and racist to a more holistic, natural rights recognition of legal personhood based on the existence of the human being. However, since the U.S. Constitution retained distinctions based on membership in and belonging to the national community (i.e., citizenship), the domestic legal system maintained the malleability of the concept and its capacity to permit exploitation.⁵⁷

In light of the domestic and international recognition of the rights of “persons,” when, why and how does the law operate so as to construct a quasi- or subordinated status with respect to fundamental aspects of existence and participation in human society?

51. *Id.* at 172-74. And, in 1982, in *Plyler v. Doe*, the U.S. Supreme Court confirmed the personhood of human beings under the U.S. Constitution, no matter their immigration status. 457 U.S. 202, 213-15 (1982).

52. The original bill of rights uses the words “the rights” and “the powers” of “the people.” U.S. CONST. amend. I-X. These phrases conjure up civic republicanism, collective political action, public rights, and positive liberty. AKHIL REED AMAR, *BILL OF RIGHTS* 215-16 (2000).

53. *Id.* at 215.

54. *Id.* at 216.

55. *Id.*

56. *Id.* (citing U.S. CONST. amend. XIV).

57. See discussion Part III *infra*.

III. MAKING AND UNMAKING LEGAL PERSONS

A. THE POWER OF THE LAW

This Part of the article seeks to depict and analyze the power of the law: why and how does it construct personhood? How does the power and authority of that construction interact with the cultural, political, and economic forces within individual societies to construct “persons”? Does law increase vulnerability? Why and how? What is the tipping point from the protective impulse to the vindictive result? When and how is the protective purpose used as a mask for more inimical intentions?

The term or concept of “person” is used expansively to defend certain prohibitions central to the legal system. Thus, the murder of any biological human being (including, in some states, viable fetuses) violates criminal laws.⁵⁸ In the conferral of benefits, such as entitlements, or the recognition and enforcement of human or civil rights, however, the term “person” may be narrowly construed so as to exclude unwelcome or disfavored groups and/or to constrain certain behaviors.

B. OBJECTIVES AND METHODOLOGIES

The construction and stratification of personhood within societies is not new, nor does that stratification always originate from malevolent intent. For example, different types and hierarchies of personhood may be constructed in order to protect the society and/or to protect individuals and groups who are viewed as vulnerable to exploitation. Under domestic U.S. law, the methodologies utilized to give and withhold rights that form legal personhood include: (a) Constitutional distinctions such as the use of different terms in the clauses of the Constitution, so that, for example, only citizens are eligible for certain rights;⁵⁹ and (b) Federal legislation and regulations that impose restrictions on certain groups;⁶⁰ (c) State legislation and regulations that impose their own restrictions on individuals or groups.⁶¹

58. For example, under Indiana law, “[a] person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide, a Class B felony.” IND. CODE § 35-42-1-6 (2010). This section does not apply to lawful abortions. *Id.*

59. For example, Article II restricts eligibility for some federal offices to native-born citizens, but *all* persons within United States territory have rights, for example, due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. See AMAR, BILL OF RIGHTS, *supra* note 52, at 171-72.

60. Examples include statutory prohibitions on access to federal housing by ex-felons, particularly drug offenders. Gwen Rubenstein and Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in INVISIBLE PUNISHMENT: THE

Some examples of protective and punitive objectives, and the methodologies deployed to affect them, are described and analyzed below.

1. *Protection of certain groups*

Minors and incompetents in need of additional state protection may be foreclosed, through the application of contract validity laws, from incurring some obligations.⁶² However, contract validity and other disabilities imposed on minors may be eliminated through a successful petition for removal of the disabilities of minority.⁶³ Further, the protection of this “vulnerable” group may be removed where a minor has transgressed the criminal law.⁶⁴ In that case, the punitive power of the law and its categorization of that law-breaking individual may change such that the transgressing minor is permanently removed from society through lifetime incarceration or permanent erasure (the death penalty).⁶⁵

The criminalization of prostituted minors, the victims of commercial sexual exploitation, exemplifies society’s ambivalence toward minors who are perceived to be transgressors of its rules. Although the Trafficking Victims Protection Act has been enforced at the federal level and many states have enacted their own anti-trafficking legislation,⁶⁶ the anti-trafficking policies have been slow to take hold at state and local levels at a time when soaring child poverty rates are increasing the involvement of girls in commercial sexual exploitation.⁶⁷ For example, B.W., a thirteen-year-old girl

COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 37, 43-46 (Marc Mauer and Meda Chesney-Lind eds., 2003).

61. They include the housing restrictions that mirror and or exceed the severity of federal laws, as well as the withholding of voting rights from ex-felons. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 21-22 (Marc Mauer and Meda Chesney-Lind eds. 2003).

62. For example, under Indiana law, contracts with a minor or incompetent may be voided. *See, e.g.*, 6 IND. LAW ENCYC. CONTRACTS § 32 (referring to mental condition or age of party).

63. *See, e.g.*, IND. CODE § 31-34-20-6 (2011) (Emancipation of Child; findings; terms).

64. For example, minors who commit certain crimes are transferred from the juvenile system and charged and punished as adults.

65. Note, however, that the Supreme Court’s opinion in *Roper v. Simmons*, 543 U.S. 551 (2005) held unconstitutional the execution of individuals who are minors at the time of the homicide, thus eliminating this option from the law’s arsenal.

66. *See* discussion, notes 141-147 and accompanying text *infra*.

67. Carrie Baker, *Jailing Girls for Men’s Crimes*, MS MAGAZINE (Dec. 8, 2010) (providing that “the FBI’s Innocence Lost National Initiative has removed more than 1,000 children from prostitution and convicted more than 570 pimps since 2003”). *See also* William Adams *et al.*, Effects of Federal Legislation on the Commercial Sexual Exploitation of

with a history of sexual and physical abuse who had been living with a thirty-two year old man, was convicted of prostitution after offering to perform a sex act for an undercover officer in return for twenty dollars. The child was charged and convicted, despite the fact that, under Texas law, she was considered incapable of consenting to sex because she was under the age of fourteen.⁶⁸ The Texas Supreme Court later reversed the conviction, stating that, “Children are the victims, not the perpetrators, of child prostitution.”⁶⁹ The court further noted that “[t]he decision to prosecute these [children] rather than provide a safe harbor only makes them more vulnerable, and more numerous.”⁷⁰

The range of legal treatment of minors—from protection to ultimate/terminal punishment—reflects philosophical and societal ambivalence about the personhood of minors and about the point at which they become full thinking beings (and, perhaps, persons?). It also demonstrates, once more, the malleability of the legal personhood of entities and groups perceived as most vulnerable.⁷¹

2. *Protection of the Society and Punishment of the Lawbreaker*

Ex-convicts from whom society believes it must be protected find their post-conviction and post-incarceration rights, such as the right to vote and to bear arms, for example, have been curtailed.⁷² As voting rights in the United States are state-based, instead of being centered in the federal Con-

Children, *Juvenile Justice Bulletin* (July 2010) (noting that an estimated 300,000 children may be subjected to commercial sexual exploitation each year).

68. Baker, *supra* note 67, at 27.

69. *Id.* at 31.

70. *Id.* at 28. In the midst of a national debate over whether underage girls selling sex should be prosecuted for prostitution, New York, Connecticut, Illinois, and Washington have enacted laws providing that prostituted girls are not criminals, but are victims of sexual trafficking instead. *Id.* at 27. Similar legislation is underway in Florida, California, Minnesota, Texas, Maryland, and Pennsylvania. *Id.* at 31. However, conservative religious groups successfully defeated a similar provision in Georgia. *Id.* at 28.

71. See *supra* introductory paragraph to Part II.C.

72. Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 50, 51-52 (Marc Mauer and Meda Chesney-Lind eds., 2003). See also Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *STAN. L. & POL'Y REV.* 153, 153 (1999):

[U]pon release from prison or discharge from non-incarcerative sentences, many ex-offenders find themselves *internally exiled*. They are saddled with restrictions that exclude them from major aspects of society. An increasing number of mandatory exclusions from the labor force and governmental programs have followed a temporary decrease of some collateral consequences during the 1960s and early 1970s.

Id. (emphasis added) (footnote omitted).

stitution, loss of such rights bars an individual's electoral participation in the municipal, state and federal elections—a form of civic death.⁷³ Racist felon disenfranchisement laws were introduced in the Southern states in the post-Reconstruction era, and spread throughout the country.⁷⁴ The continued effectiveness of those laws in maintaining the subordination and eliminating the civic participation of black citizens increased their attractiveness and probably contributed to their staying power.⁷⁵ For example, in the state of Florida, during the 2000 Presidential Elections, the laws were instrumental in foreclosing the participation of a significant number of black voters.⁷⁶

The post-incarceration penalties extend to entitlement programs that would facilitate the re-integration of ex-convicts into the society. For example, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996.⁷⁷ The legislation replaced individual welfare entitlements with block grants to states called Temporary Assistance to Needy Families (TANF).⁷⁸ PRWORA provides that “[a]nyone convicted of a federal or state felony . . . that involved the possession, use, or distribution of drugs is not eligible to receive food stamps or [TANF], and the amount payable to any family or household of which such a person is a member is reduced proportionately.”⁷⁹ Notably, this is a lifetime ban.⁸⁰

The penalties also extend to the ability to afford housing following release from prison. Federal housing laws permit public housing authorities to exclude applicants for public housing or housing assistance who have prior

73. See Manza and Uggen, *supra* note 23, at 13 (“The U.S. Constitution vests the states with the right to decide who can vote, and except for the explicit constitutional exceptions, states are free to decide which criteria they want to use.”)

74. See Elizabeth A. Hull, *The Disenfranchisement of Ex-Felons 18–23* (2006).

75. See *id.* at 11, 20–21, 23–27.

76. *Id.* at 134–37 (describing the removal of many Blacks from the Florida voter lists).

77. Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 37, 40 (Marc Mauer & Meda Chesney-Lind, eds., 2002).

78. *Id.* at 40–41.

79. OFFICE OF THE PARDON ATTORNEY, U.S. DEP’T OF JUSTICE, *FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION* 10 (2000), available at http://www.usdoj.gov/pardon/collateral_consequences.pdf [hereinafter *FEDERAL STATUTES*].

80. Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 *GEO. J. ON POVERTY L. & POL’Y* 299, 309 (2005). States may, however, elect not to impose the ban or to limit it temporarily. 21 U.S.C. § 862A(D). Eight states and the District of Columbia have completely opted out of the ban. *Id.*, at 309. Twenty states have modified the ban, while twenty-two have adopted it in its entirety. *Id.* Significantly, PWORA’s prohibition only reaches drug offenses, reflecting the War on Drugs mentality of the 1990s. Therefore, an individual convicted of murder or child molestation remains eligible for TANF and food stamps, while a person convicted of possession of marijuana faces the possibility of a lifetime ban. Rubinstein & Mukamel, *supra* note 77, at 41.

criminal convictions, particularly those applicants who had been convicted of drug-related offenses.⁸¹ Moreover, certain types of offenders face lifetime bans from federally assisted housing.⁸²

Other federal laws indirectly impede ex-convicts' efforts to obtain employment.⁸³ For example, one federal statute denies certain federal funds from states that do not automatically revoke drug offenders' driver's licenses for six months.⁸⁴ Additionally, there are legal restrictions on employment opportunities for ex-convicts at both the federal and state levels.⁸⁵ Further, Federal law prohibits felons from securing certain kinds of employment, including a permanent inability to enlist in any branch of the armed forces (unless an exception is made).⁸⁶ As summarized by law professor Nora Demleitner:

Increasingly, regulatory and administrative decisions denying governmental benefits also substantially impact the ex-offender's family by restricting her employment opportunities and participation in governmental programs. Moreover, the rise in the rate of individuals with criminal records has caused a growing number of ex-offenders and their families to experience this de facto punishment.⁸⁷

81. Finzen, *supra* note 80, at 312-13. Additionally, the Department of Housing and Urban Development has adopted a "One Strike and You're Out" policy for criminal and drug-related activity. *Id.*, at 313-14. Moreover, the United States Supreme Court has rejected the "innocent owner" defense, meaning that a lessee can be evicted even if he or she had no knowledge of the criminal activities of another household member or guest. *Id.* at 313 (citing *Dept. of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002)). Further, the applicants' right to privacy is curtailed: public housing authorities may require applicants to disclose their drug treatment records. *Id.* at 313.

82. For example, individuals convicted of manufacturing or producing methamphetamine on the premises of federally assisted housing may be evicted and permanently barred from federal low-income housing. FEDERAL STATUTES, *supra* note 79, at 10. Similarly, individuals facing lifetime state sex-convict registration requirements are permanently barred from federally assisted housing. *Id.*

83. Finzen, *supra* note 80, at 315-16.

84. *Id.* at 316. This law narrows the employment options available to ex-convicts by removing jobs that involve driving from the menu of potential employment options, and also makes it more difficult for ex-convicts to get to work. *Id.* Ex-convicts face many barriers to obtaining employment upon their release from prison. Many employers are reluctant to hire individuals with criminal backgrounds, and technological advances have made it increasingly easy and inexpensive to conduct criminal background investigations prior to making hiring decisions. *Id.* at 315.

85. FEDERAL STATUTES, *supra* note 79, at 315.

86. *Id.*

87. Demleitner, *supra* note 72, at 153.

The disabilities and constraints on participation in multiple spheres of society do not come solely from the federal government. In addition to the provisions in federal law that require states to bolster (and thus multiply) the effects of the punitive federal post-incarceration provisions, numerous state laws also limit ex-convicts' employment options.⁸⁸ These statutes vary widely from state to state.⁸⁹ One of the most common ways in which states restrict employment opportunities is by limiting the availability of professional licenses to ex-convicts.⁹⁰ In many instances, licensing laws may expressly prohibit ex-convicts from engaging in an occupation.⁹¹

The consequences for the ex-convict are quite draconian. The ability to participate in and be a part of society -- the ability to live, to work, to be a citizen (expressed through voting), i.e., the "legal personhood" of the individual becomes quite constrained.⁹² According to Professor Nora Demleitner:

Ex-offenders remain banished from mainstream society. Even upon expiration of the maximum sentence, collateral sentencing consequences continue to remove the ex-offender from society—at least figuratively—by bestowing outlaw status upon her and preventing her from regaining full membership rights. 'Our actual practice is to permit almost all criminals to return to society, in a physical sense, but to hold them off, make them keep their distance, segregate them in the midst of the ordinary community.' By relegating the ex-offender to internal exile, existing restrictions on the rights of ex-offenders come into conflict with international human rights norms that have abolished banishment and exile as punishment for citizens.⁹³

88. Finzen, *supra* note 80, at 313.

89. *Id.*

90. *Id.*

91. *Id.* Additionally, licensing laws may indirectly prohibit ex-convicts from engaging in certain types of employment by requiring individuals seeking occupational licenses to have good moral character and using past criminal history as evidence of bad moral character. *Id.* Quite often, state licensing statutes bar all ex-convicts from employment in the licensed occupation, regardless of whether the past offenses are at all related to the type of employment sought. *Id.* Thus, individuals with past drug convictions may be barred from working as septic tank cleaners and those with past convictions for burglary may be denied the licensure necessary to become embalmers. *Id.*

92. Demleitner, *supra* note 72, at 159-60 (citations omitted).

93. *Id.* at 159-60. Professor Demleitner's concludes that: "Outlaw status amounts not only to a denial of full citizenship but also to a violation of the ex-offenders' human rights." *Id.*

The punitive impact is intentional. Professor Demleitner asserts that: “Some members of Congress, for example, have indicated in floor debates that criminal offenders are either lesser human beings or not human at all.”⁹⁴

3. *Protection of the Nation State from the “Other”*

In order to protect the nation-state from the participation of the non-citizen, the rights of that group—including rights of participation and societal protections—are limited.⁹⁵ Immigrants have never enjoyed the same rights as citizens under domestic U.S. law.⁹⁶ However, the immigration reforms and non-reforms of most recent decades have succeeded in further shrinking those already limited rights.⁹⁷ As in trans-Atlantic slavery,⁹⁸ the legal personhood of these individuals and groups is a fraction of the personhood of the citizen or permanent resident. As a result, non-citizens do not enjoy the full range of rights that inhere in the citizen, and even previously recognized Constitutional protections may be withdrawn.⁹⁹ The limitations apply both to permanent residents¹⁰⁰ who are non-citizens lawfully present in the United States and to undocumented immigrants.

The effect of such disabilities is the creation of stratified personhood that enshrines inequality. According to law professor Owen Fiss:

The subjugation produced by the laws imposing social disabilities on immigrants is, however, of another character, for what is entailed is not simply drawing a distinction among people, but rather creating a different kind of social

94. *Id.* at 160 (quoting EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* (5th ed. 1955)).

95. See Owen Fiss, *The Immigrant as Pariah*, *BOSTON REVIEW* (October/November 1998), available at <http://bostonreview.net/BR23.5/Fiss.html> (“The political disabilities rest on the idea that the nation is a community, not just a geographic bounded territory, and like any such voluntary organization requires rules of membership and vests the power of governance in those lawfully admitted to membership.”).

96. (For example, non-citizens in the United States do not have the right to vote.)

97. *E.g.*, Title V of the Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, Div. C (Sept. 30, 1996) and Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (Aug. 22, 1996) restricted or removed non-citizen eligibility for the vast majority of federal public benefits. These include housing assistance and food assistance. This stringent re-writing of law applies to both documented and undocumented immigrants.

98. See Bravo, *supra* note 17, at 269 -74, 291.

99. Johnson, *supra* note 14, at 275.

100. “Permanent residents are non-citizens who have been granted permission to stay in the country, access to the labor market, some civil rights, limited welfare rights, and yet more restricted political rights.” Demleitner, *supra* note 72, at 165 n.44.

structure altogether: it entails a further stratification or degradation of the very poor, or in Justice Brennan's words, 'raises the specter of a permanent caste.' . . . These laws further isolate poor immigrants from the dominant groups in society and make them vulnerable in a way that is not true of laws that privilege intelligence or wealth.¹⁰¹

4. *Protection of the Native Worker and of the Economy*

In order to protect the native- (or citizen-) worker and the economy, legal disabilities are imposed on both the "uninvited," "illegal" migrant worker and the lawfully present guestworker.¹⁰² These disabilities are even more severe than those imposed on the lawfully present non-citizen.¹⁰³

The sources of such restrictions stem from federal, state, and municipal authorities. In addition to the threat of deportation and other disabilities under federal law, states and municipalities are the source of additional constraints on the illegal migrant worker. Since 2006, state laws and local ordinances concerning immigration-related issues have proliferated. This floodtide of legislation is justified under a theory that illegal immigration undermines the sovereignty of the United States, poses a threat to national security, raises crime rates, steals jobs, and financially burdens the states, which, due to federal inaction, are forced to deal with the consequences of illegal immigration through their traditionally recognized police powers.

The most recent wave of anti-immigrant ordinances on the local level began with a ballot measure in San Bernardino, California in 2006. The measure unsuccessfully sought to (a) deny city money and permits to businesses that employ undocumented immigrants, (b) allow local police to seize the automobiles used to pick up day laborers, (c) prohibit the ability of undocumented immigrants to rent property, and (d) require that all city business take place only in the English language.¹⁰⁴ Although immigrants' rights and civil rights advocates defeated the bill, similar proposals began to emerge throughout the country.

101. Fiss, *supra* note 95 (quoting Plyler v. Doe, 457 U.S. at 213). In *Plyler*, the Supreme Court confirmed the personhood of undocumented immigrants under the Constitution of the United States.

102. See generally Close to Slavery, *supra* note 2; and notes 137-140 and accompanying text *infra*.

103. See Johnson, *supra* note 14, at 284-86.

104. *Proliferation of Local Anti-Immigrant Ordinances in the United States Before Jorge Bustamante, the United Nations Special Rapporteur on the Human Rights of Migrants*, May 12, 2007 (Testimony of Udi Ofer, Legislative Counsel, New York Civil Liberties Union), <http://www.nyclu.org/content/proliferation-of-local-anti-immigrant-ordinances-united-states>.

Within the first year after the San Bernardino proposal, ninety local governments proposed more than a hundred ordinances similar to the model.¹⁰⁵ In addition, immigration was the subject of at least 540 bills in twenty-seven states in 2006.¹⁰⁶ Anti-immigration measures continue to be introduced throughout the country: In April 2010, Arizona passed a far-reaching anti-immigration measure, SB 1070, which would have required, among other things, that state and local law enforcement ascertain the immigration status of individuals who they suspect are undocumented immigrants, and detain those unable to substantiate the legality of their status.¹⁰⁷ Several states have followed Arizona's lead. For example, Indiana's legislature adopted Senate Bill 590, which is remarkably similar to the disputed Arizona legislation,¹⁰⁸ and an Illinois legislator recently proposed an Arizona-style bill, HB 1969.¹⁰⁹

The rise in state general immigration legislation reflects the frustration of many state and local lawmakers with inaction from the federal legislative branch in Washington.¹¹⁰ Curiously, Republicans, who control the House of Representatives, do not support an overhaul of immigration laws, which President Obama has promised to continue to support,¹¹¹ even while Republican state legislative counterparts spearhead the majority of state-level anti-immigrant legislation.¹¹²

105. *Id.*

106. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1558 (2008).

107. See Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010. Following a challenge by the federal government, implementation of parts of the legislation is currently stalled. See Randal C. Archibold, *Judge Blocks Arizona's Immigration Law*, N.Y. TIMES, July 28, 2010.

108. See *Carrie Ritchie, Immigration Bill Signed Amid Arrests*, INDP. STAR (May 11, 2011). See also Mary Beth Schneider, *Delph Pitching New Bill on Illegal Immigration*, INDP. STAR (January 14, 2011), <http://www.indystar.com/article/20110114/NEWS05/110114026/Delph-pitching-new-bill-illegal-immigration>.

109. Teresa Puente, *Illinois Politician Proposes Anti-Immigrant Law Like Arizona's*, CHICAGO NOW, Mar. 5, 2011, available at <http://www.chicagonow.com/blogs/chicanisima/2011/03/illinois-politician-proposes-anti-immigrant-law-like-arizonas.html>.

110. Julia Preston, *Political Battle on Illegal Immigration Shifts to States*, N.Y. TIMES (Dec. 31, 2010).

111. *Id.*

112. However, the Utah state legislature has raised the prospect of a state-level guestworker program as an alternative to the punitive tenor of other state-level immigration-related legislation. See, e.g., Julia Preston, *Utah G.O.P. Adopts Immigration Alternative*, N.Y. TIMES (March 6, 2011). However, implementation of the legislation has been blocked. *Utah Immigration Law is Blocked*, N.Y. TIMES (May 11, 2011).

5. *Protection and Promotion of the Economy*

In contrast to the constraints and limitations imposed on some human beings—constraints and limitations whose impact limits those human beings' legal personhood—in the pursuit of protection of the economic system, attributes of personhood are increasingly recognized in and protected on behalf of artificial entities. That is, the artificial entity becomes a juridical entity, which becomes a legal *person*; and courts find that those legal persons are protected by a growing array of constitutional and other legal rights.

In order to meet the ever-expanding need for capital, as well as to diversify the associated risks attendant to generating profit, capitalism has developed various forms of collectivization or aggregation of identity. Such developments have ancient roots.¹¹³ The juridical person, the corporation, is understood primarily as a legal device which simplifies and stabilizes the complicated web of contractual relationships that an association of shareholders must enter into with a variety of outside parties. Its legal personality endows the corporation with the legal capacity to interpose itself between shareholders and outside parties and to enter into contracts with the latter on behalf of the former.¹¹⁴

In the early history of the United States corporations were legal entities of little importance. States retained strict control over these legal persons by closely supervising them and reserving the right to amend or repeal their corporate charters at any time.¹¹⁵ However, widespread distrust of the entities changed with time and economic necessity.¹¹⁶

113. See, e.g., Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 587-88 (1999):

For instance, excavations of private archives of a commercial settlement at Kanesh, a colonial town of the Old Assyrian state, brought to light the extensive use of long-term partnership contracts, known as *naruqqum*, in conducting the long-distance caravan trade as early as the 19th century BC. The ancient Romans are also known to have set up a number of partnership firms for their maritime trade. In fact, partnership forms of business firms were all over the pre-modern commercial worlds—in the East China Sea, along the Yellow River, along the Silk Roads, in the South Sea, in the Indian Ocean, along the Tigris-Euphrates Rivers, and in the Mediterranean Sea.

114. *Id.* at 587-88, 590.

115. Katie J. Thoennes, Comment, *Frankenstein Incorporated: The Rise of the Corporate Power and Personhood in United States*, 28 HAMLINE L. REV. 203, 206-07 (2005).

116. According to Thoennes,

Despite any reservations during this period, many people saw the benefits and need to create corporations. Originally, corporations were charted exclusively to provide benefits to the public, such as building

The United States Supreme Court's 1886 *Santa Clara County v. Southern Pacific Rail Road Co.*¹¹⁷ decision is one of the most significant cases in the history of corporate America.: Since its issuance, the opinion has influenced court decisions relating to corporations and their status as "persons". According to Katie Thoennes, the case is known for the following statement made by then-Chief Justice Waite prior to oral argument:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.¹¹⁸

Following *Santa Clara*, the Court has broadly expanded the rights of the corporate juridical person.¹¹⁹ For example, the court broadened recognition and enforcement of constitutional protections for corporations, and shielded the entities from some state statutes.

roads and bridges or digging canals. In return for providing public services, states granted to corporations perpetual existence, limited liability, and the right to own property. By forming corporations, people were able to accomplish more than an individual could by acting alone because of the corporate structure and the ease with which capital could be obtained. Corporations were seen as 'great engines for the promotion of the public convenience, and for the development of public wealth.'

Id. (citations omitted).

117. 118 U.S. 394 (1886). However, the case has not been cited for its holding because the Court's opinion does not address or discuss the issue of whether corporations fall under the classification of a "person" for purposes of the Fourteenth Amendment. Thoennes, *supra* note 115, at 209-10.

118. *Id.* at 209-210.

119. *See id.* at 210-11. According to Thoennes:

Following the *Santa Clara County* decision, the United States Supreme Court proceeded to strike down numerous state regulations as violations of corporations' constitutional rights. The Court applied the Fourteenth Amendment to prohibit state acts that deprive corporations of property without due process of law, and that deny corporations the equal protection of the law. The Court also applied the Fifth Amendment to protect corporations against double jeopardy and to require states to pay just compensation for property taken from corporations; the Fourth Amendment to protect corporations from unreasonable searches and seizures; and the First Amendment to protect corporate freedom of speech, including the right to make political contributions, the right to commercial speech, and the right to be protected against compelled speech.

Id. (citing William Meyers, *The Santa Clara Blues: Corporate Personhood versus Democracy*, III Publ'g, Nov. 13, 2000, at 5, at <http://www.iiipublishing.com/afd/SantaClara.pdf>).

There is wide disagreement in the literature about the scope of rights for corporations under domestic and international law.¹²⁰ However, the disagreements take place against a firm consensus provided by the concept of the juridical person and the protections afforded by that status.

C. EFFECTS: QUASI-PERSONHOOD

How and when does the manipulation of the concept of personhood and/or the legal distinctions among “persons” pervert the society’s stated purposes, furthering and maintaining the exploitation, including enslavement, of some by others? How and why is quasi-personhood constructed within a legal system so as to normalize the exclusion of certain groups, and to set the stage for their exploitation by others within and outside the society?

Parts III(A) and III(B) above delineated the objectives and methodologies deployed by federal and state legal systems in efforts to further societal purposes of protection and punishment. In their current forms, these policies and methodologies combine to strip individuals and groups of their personhood—their ability to interact fully, from positions of equality, within society, thus making them vulnerable to exploitation.

Exclusion from the definition of “person” leads to the creation of categories and strata of quasi-personhood. Where legal recognition and protection of personhood is withheld from targeted individuals and groups, the opportunity for exploitation, including human trafficking, is increased. The gap between legal recognition of personhood and biological human existence exists, for example, where immigrants (both legal and undocumented) are not extended the human and civil rights of citizens of host states;¹²¹ and

120. See, e.g., William Quigley, *Catholic Social Thought and the Amoralism of Large Corporations: Time to Abolish Corporate Personhood*, 5 LOY. J. PUB. INT. L. 109, 128-133 (2004). See also Iwai, *supra* note 113, at 583-85.

121. According to Bridget Anderson and Julia O’Connell Davidson:
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

where ex-convicts are consigned to political death or internal exile by permanent disenfranchisement.¹²²

While immigration is an area of law traditionally regulated by the federal government and thus, subject to a presumption of preemption, state legislation concerning areas of the law traditionally regulated by the states is viewed as a valid exercise of a state's police powers.¹²³ Beginning in the mid-1980s, federal immigration law has evolved from a stepchild of foreign policy to a comprehensive legislative and regulatory scheme that intersects the triumvirate of state power: criminal law, employment law, and welfare.¹²⁴ Specifically, because crime control is a centerpiece of state power, closer ties between immigration and criminal law have a particularly strong impact on the domestication of immigration law.¹²⁵ Therefore, it is argued that the proliferation of general immigration legislation is well within the police powers reserved to the states. This lends legitimacy to states passing general immigration legislation under the guise of their ability to experiment in social policymaking. In fact, every state in regular session considered laws related to immigrants or immigration in 2010.¹²⁶ The key areas of interest addressed in the general immigration legislation have been fairly consistent over time, mostly focusing on areas such as budgets, education, employment, health, human trafficking, law enforcement, and identification/driver's licensing.¹²⁷

The interaction of multi-scalar federal and state constitutional, statutory, and regulatory provisions creates disabling multiplier and enhancement effects on the personhood of targeted groups and individuals. For example, it is possible to map the negative consequences for an individual of the assertion of federal immigration statutes and regulations and federal anti-drug trafficking housing laws with state and/or municipal restrictions on immigrants and ex-felons. The interaction of such effects could lead to internal banishment and foreclosure of future paths of action that are sanctioned by the law.

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.

BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY 44 (2003).

122. Mauer, *supra* note 72, at 51.

123. See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 823 (2008) (arguing that the Constitution does not require exclusive federal authority with respect to immigration).

124. Stumpf, *supra* note 106, at 1565.

125. *Id.* at 1587.

126. See Preston, *supra* note 110.

127. See, e.g., Stumpf, *supra* note 106.

The mutation of historic forms of exploitation into analogous modern forms may be masked with the help of the legal system. In the United States, for example, it is possible to trace the evolution in legal construction of quasi-personhood from slavery through Jim Crow laws through the disenfranchisement of ex-felons and the dehumanization of immigrants.¹²⁸ The quasi-personhood crafted in prior eras has mutated to subtler legal quasi-personhood, which enshrine racial, economic, and other forms of subordination.

IV. QUASI-PERSONHOOD AND HUMAN TRAFFICKING

In its anti-human trafficking efforts, the United States has explicitly recognized the vulnerability of some individuals and groups as a key contributor to the risk of exploitation. For example, the Congressional Findings preceding the 2000 Trafficking Victims Protection Act included the following acknowledgments about the sources of control utilized by traffickers and vulnerability of illegal immigrants: “Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable.”¹²⁹ The legislators also found that “Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves.”¹³⁰ However, despite these acknowledgements, and despite the protection, prevention, and prosecution purposes and policies expressed in the provisions of the TVPA, the internal domestic laws of the United States continue to create vulnerabilities in targeted individuals and groups, thus contributing to their exploitation.

According to commentator Anna Zalewski, “[t]he majority of trafficked persons are migrant workers.”¹³¹ Undocumented immigrants feel increasingly at risk for removal and find their scope of activity and participation increasingly constrained. One undocumented immigrant located in Arizona, who refuses to drive and leaves the home only to volunteer at her

128. See, e.g., DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 7-9 (2008) (describing the re-enslavement of blacks after Reconstruction through the mechanisms of the criminal law and incarceration policies); and Weatherspoon, *supra* note 20 (arguing that mass incarceration policies re-enslave African-American males). See also Johnson, *supra* note 14, *passim*; HULL, *supra* note 74.

129. Trafficking Victims Prevention Act, 22 U.S.C. § 7101(b)(5).

130. Trafficking Victims Prevention Act, 22 U.S.C. § 7101(b)(17).

131. See Anna Zalewski, Note, *Migrants for Sale: The International Failure to Address Contemporary Human Trafficking*, 29 SUFFOLK TRANSNAT’L L. REV. 113, 121 (2005).

children's elementary school, stated, "[y]ou can't walk alone because if you are walking alone and you get taken, who is going to tell your family you are gone?"¹³² Her perception is that that smuggled immigrants, such as herself, receive the same treatment as the perpetrators, thanks to an interpretation of Arizona's anti-smuggling statute in Maricopa County, Arizona, that assigns the same level of responsibility to the criminals who smuggle people into the country, known as "coyotes," and the people they sneak across the border.¹³³

This is discouraging, since immigrant-related violence is on the rise, according to Arizona's Department of Public Safety and Phoenix Police.¹³⁴ At the same time, Immigration and Customs Enforcement acknowledges that, "violence associated with human smuggling seems to be up . . . [w]e get a lot of referrals from police departments in other places where the relatives will get a call and the person will say, 'I'm in Phoenix. I'm being held in a house and they told me if you don't pay \$100,000 they will cut my ears off or cut my fingers off.'"¹³⁵

In the domestic context, Professor Jennifer Chacón identifies United States immigration and labor laws as intricately involved in creating preconditions that facilitate trafficking into the United States.¹³⁶ The dire effects of such policies are plain, even (or especially?!) with respect to migrant workers who enter the United States legally pursuant to programs that have received the imprimatur of approval from the U.S. federal government. As outlined in the Southern Poverty Law Center's 2007 report, the laws and regulations that structure the program facilitate and even *invite* exploitation that is close or identical to the restrictions on movement and/or exit that is characteristic of human trafficking.¹³⁷ Examples of the con-

132. Megan Irwin, *Flushing Them Out: Joe Arpaio and Andrew Thomas are Teaching the Rest of the Nation How to Terrorize Illegal Immigrants*, PHOENIX NEW TIMES, Dec. 27, 2007, available at <http://www.phoenixnewtimes.com/2007-12-27/news/flushing-them-out/>.

133. *Id.*

134. *Id.*

135. *Id.* In Arizona, even U.S. citizens of Hispanic descent carry United States passports around to prove they are citizens. *Id.*

136. See generally Jennifer Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977 (2006).

137. This includes the confiscation of the workers' passports and other identity papers in order to control their mobility and eliminate their ability to escape the exploitative conditions. See Southern Poverty Law Center, *supra* note 2, at 15.

The Southern Poverty Law Center has received dozens of reports of this practice and has, in the course of its legal representation of workers, confirmed that it is routine. While some employers state that they hold the documents for the purpose of 'safekeeping,' many have been quite candid in explaining that there is a great risk that workers will flee if the documents are not held. One employer sued by the Southern Poverty

straints that facilitate the exploitation are the dependence on a single employer who possesses unfettered control over the future employability of individual workers within the guest worker program,¹³⁸ as well as the limitation on the migrant workers' ability to have recourse to law.¹³⁹

Sociologist Bridget Anderson also identified immigration laws as a key source of vulnerability for trafficked individuals, describing the relationship between restrictive immigration laws and exploitability:

Law Center stated in her deposition that the company kept workers' Social Security cards in the office because 'if they have their Social Security card, they'll leave.'

Id. See also *id.* at 16 ("The Southern Poverty Law Center also has encountered numerous incidents where employers destroyed passports or visas in order to convert workers into undocumented status.").

138. See Southern Poverty Law Center, *supra* note 2, at 15.

The most fundamental problem with guestworker programs, both historically and currently, is that the employer — not the worker — decides whether a worker can come to the United States and whether he can stay. Because of this arrangement, the balance of power between employer and worker is skewed so disproportionately in favor of the employer that, for all practical purposes, the worker's rights are nullified. At any moment, the employer can fire the worker, call the government and declare the worker to be "illegal."

Id.

139. See Southern Poverty Law Center, *supra* note 2, at 8.

Though the H-2B program was created two decades ago by the Immigration Reform and Control Act (IRCA) of 1986, the DOL has never promulgated regulations enacting substantive labor protections for these workers. IRCA, in fact, does not explicitly require such regulatory safeguards, providing only the guidance that the importation of H-2B workers must not adversely affect U.S. workers' wages and working conditions.

And, unlike the H-2A program, the procedures governing certification for an H-2B visa were established not by regulation but rather by internal DOL memoranda (General Administrative Letter 1-95) and therefore were not subject to the public comment and review process required when new federal regulations are adopted. An employer need only state the nature, wage and working conditions of the job and assure the DOL that the wage and other terms meet prevailing conditions in the industry. Because the H-2B wage requirement is set forth by administrative directive and not by regulation, the DOL takes the position that it lacks legal authority to enforce the H-2B prevailing wage. While the employer is obligated to offer full-time employment that pays at least the prevailing wage rate, none of the other substantive regulatory protections of the H-2A program apply to H-2B workers. There is no free housing. There is no access to legal services. There is no "three-quarters guarantee." And the H-2B regulations do not require an employer to pay the workers' transportation to the United States.

Id. (internal footnotes omitted).

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.*¹⁴⁰

It is worth noting that laws targeting human trafficking have tripled in 2009 compared to 2008.¹⁴¹ Midwestern states such as Illinois, Indiana, Iowa, and Wisconsin closely mimic the federal legislation in terms of defining “human trafficking.”¹⁴² Indiana has statutory protections in place for victims, such as law enforcement training, restrictions on victim detention, and administrative positions that provide assistance and services to victims.¹⁴³ The Illinois Department of Human Services also provides, subject to availability, funds for emergency services and assistance to victims.¹⁴⁴ Iowa mandates law enforcement training and cultural sensitivity in the context of human trafficking,¹⁴⁵ and provides an interesting affirmative defense to human trafficking offenders who commit violations under compulsion by another’s threat of imminent serious injury.¹⁴⁶ Ohio takes an interesting approach to defining “human trafficking” by providing that the offense must be a scheme or plan involving at least two statutorily identified felony offenses.¹⁴⁷

However, despite the seemingly protective objectives underlying the expansion of state anti-human trafficking legislation, the driving thrust of

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

141. See Preston, *supra* note 112. In addition, 2010 introduced a new area of immigration concern, with three states, Alabama, Florida, and Tennessee, enacting laws to help prevent child abductions. *Id.*

142. See, e.g., IND. CODE § 35-42-3.5-1(a) (2011).

143. See, e.g., IND. CODE § 35-42-3.5-4(a) (2011).

144. See 720 ILL. COMP. STAT. 5/10-9(h) (2011).

145. See IOWA CODE § 80B.11 (2010).

146. See IOWA CODE § 710A.3 (2010).

147. See ORC Ann. 2929.01(AAA) (2011). Rather than address the labor component provided in the federal legislation, the Ohio definition highlights only sexual or obscene offenses. *Id.*

state-level immigration-related legislation focuses on disabling “the Other”—stripping certain human beings of personhood in order to protect the nation state, the polity, the economy, from “the Other.”¹⁴⁸ The enactment of anti-immigration statutes appears to implicate an anti-Latino and anti-Hispanic sentiment, which blames aliens for social problems and will result in further discrimination against and exploitation of an already marginalized group. State laws and local ordinances concerning immigration-related issues victimize undocumented immigrants, who may in fact already be victims of human trafficking.

Traffickers and corrupt officials use the quasi-personhood of their victims to assert control, to foster a psychological sense of helplessness and dependence, and to bolster their claims of power over their victims. Too often, those claims turn out to be true: The law itself enshrines the imbalances in power through the imposition of quasi-personhood. In turn, the victims’ quasi-personhood status creates perverse disincentives. Under the threat of deportation or other law enforcement penalty, the trafficked person is less likely to seek out law enforcement or other sources of rescue.¹⁴⁹ At the same time, law enforcement agencies are less likely to recognize the victimization endured by those individuals or groups, seeing not victims in need of assistance, but suspects who must be apprehended.¹⁵⁰ The consequent failure to intervene then serves to lengthen the period of such victims’ exploitation.

These contradictions exemplify the conflict between society’s ideals, obligations, and stated intent -- evidenced by federal and state anti-human trafficking statutes and state and federal laws -- in a multiplicity of spheres (such as anti-illegal immigration and post-incarceration punishment of convicted lawbreakers) as well as the influence of that conflict on the actual lived experiences of trafficked humans. The result is conflict, contradiction, and subversion of both the United States’ federal anti-trafficking legislation’s stated goals of prevention, prosecution, and protection of trafficked individuals and of the goals of the anti-human trafficking initiative of state legislators.¹⁵¹

148. See discussion, Parts III.B.4 and 5 *supra*.

149. Haynes, *supra* note 3, at 252.

150. *Id.* at 366-367. See also Carrie Ritchie, *19 Arrested in Bust of Prostitution Ring*, THE INDIANAPOLIS STAR, May 5, 2011, A1 (describing federal law enforcement arrests in connection with the interstate and international commercial sexual exploitation of women “smuggled” from Mexico and countries in Central America). According to Ritchie’s report: “No evidence showed the women were held against their will, the authorities said.”

151. Haynes, *supra* note 3, at 337-38, 380-81.

V. CONCLUSION

The manipulation of the concept of personhood and the legal distinctions among “persons” pervert the society’s ideals, furthering and maintaining the exploitation, including enslavement, of some by others. Quasi-personhood is constructed within the legal system and deployed with the resulting normalization of the exclusion of certain groups that sets the stage for their exploitation by others within the society.

Rather than a protective rationale, the contradictions within the legal system—its doctrines and rules—appear to manifest the intention of the society to assert power and restrict the ability of subordinated and threatening groups or individuals to participate as equals. Further, the diminution in the spheres of activity and legal rights of some human beings contrasts with the expansion in the rights recognized in and enforced on behalf of artificial legal persons.¹⁵²

Constraints on personhood should be limited by the force and power of the reality of humanity and the goal of equality. For example, Anna Zalewski calls for a fuller integration of the law enforcement provisions of the Trafficking Protocol with the protections offered by the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (the “Migrant Convention”).¹⁵³ According to Zalewski, the “wide range of economic, social, cultural and labor rights” offered by the Migrant Convention, even to undocumented workers, and the obligations undertaken by state parties to protect migrant workers and their families offer a bulwark against the exploitation of trafficking.¹⁵⁴ To address human trafficking, we must deploy not just the rhetoric of equality, but the operation and implementation of policies and mechanisms that prevent vulnerability to exploitation.¹⁵⁵ Full personhood of the individual must be understood as a *right*, not a privilege. At minimum, constraints on personhood should be accompanied by detailed explanations (and understanding) of the policy and other reasons for the limitations created and the ways in which the drafters believe that those constraints will be implemented in real lives in interaction with other legal disabilities and economic, cultural, and social forces.

152. For example, the U.S. Supreme Court, in *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010), rejected its own longstanding precedent in order to uphold the free speech rights of artificial business entities.

153. G.A. Res. 45/158, U.N. Doc. A/RES/ 45/158 (Dec. 18, 1990). (The Migrant Convention became effective on July 1, 2003).

154. See Zalewski, *supra* note 131, at 127-28. Note, however, that the United States has neither signed nor ratified the Migrant Convention.

155. See Fiss, *supra* note 95 (“We ought not to subjugate [fellow human beings], not because we owe them anything, but to preserve our society as a community of equals.”).

The lack of holistic analysis of multi-level, contradictory, and potentially multiplicative statutes and regulations and their interaction with cultural and social norms undermines the ability to respond to and to attack in coherent form the multiple sources of the imposition of quasi- and non-personhood and consequent vulnerability to exploitation.