

## HUMAN TRAFFICKING, IMMIGRATION REGULATION, AND SUBFEDERAL CRIMINALIZATION

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*In the fifteen years since the enactment of the Trafficking Victims Protection Act—the U.S. legislation implementing the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children—every state in the United States has enacted its own, state-level antitrafficking law. This paper presents a multistate survey of state-level antitrafficking laws and the criminal prosecutions that have been conducted pursuant to those over the past decade. The comparative treatment of noncitizens and citizens in antitrafficking prosecutions is of particular concern. This research reveals that while sub-federal implementation of antitrafficking laws has the potential to complement stated federal and international antitrafficking objectives, it also has the power to subvert and undermine those goals. State-level enforcement both mirrors and amplifies some of the systemic problems that arise when the criminal law is used as a tool to combat trafficking, including the manipulation of antitrafficking tools and rhetoric to perpetuate racial subordination and migrant criminalization. Ultimately, this research offers broader theoretical insights into the promises and pitfalls of overlapping criminal jurisdiction both within federalist systems and within frameworks of international regulation.*

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## INTRODUCTION

In less than two decades, the issue of human trafficking has evolved from a relatively obscure concept to a widely discussed international social problem that has engendered a host of interventions at the international, national, and subnational level. Yet, even as the problem of human trafficking has become the focus of significant global attention, it eludes precise understanding. By some estimates, human trafficking, which is frequently (and not without controversy) characterized as “a form of modern slavery,”<sup>1</sup> is a “multi-billion dollar criminal industry that denies freedom to 20.9 million people around the world.”<sup>2</sup> But these estimates are contested, not only because data on trafficked populations is methodologically difficult to obtain, but more fundamentally, because there is deep disagreement over the meaning of the term “human trafficking” itself.<sup>3</sup>

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1. Enslavement can be prosecuted under international law as a crime against humanity, but “enslavement” is narrower than trafficking, and trafficking can be prosecuted as a crime against humanity only when it is part of a widespread or systemic attack on civilian populations. Rome Statute of the International Criminal Court art. 7(t)(c), July 17, 1998, 2187 U.N. T.S. 90. For a detailed legal discussion of the distinctions between crimes of enslavement and trafficking crimes, including expressions of concern over imprecise connotations of the term, see Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 799–810 (2009).

2. POLARIS PROJECT, *Human Trafficking*, <http://polarisproject.org/human-trafficking>. During the debate leading to the passage of the Trafficking Victims Protection Act in the United States, Congress initially relied on Central Intelligence Agency estimates that approximately 50,000 individuals were trafficked into the United States every year. Those numbers, based on estimates from the Central Intelligence Agency, were later revised downward to 14,500–17,500. The downward revisions were attributed to definitional changes. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2982 (2006)

3. As Dina Francesca Haynes writes:

There are . . . conflicting viewpoints about many aspects of human trafficking. There are disagreements as to the extent of the problem, the definition of trafficking, who the victims are, how best to support them, and how to combat trafficking more generally. Statistical data on human trafficking are wildly inconsistent and lack rigorous empirical support.

Dina Francesca Haynes, *The Celebrityization of Human Trafficking*, 63 ANNALS AM. ACAD. POL. & SOC. SCI. 25, 30 (2014). Because the very malleability of the definition of “trafficking” is a central concern of this article, I eschew efforts to quantify the scope of the problem here.

This definitional uncertainty is reflected in the varying legal instruments and in the antitrafficking strategies pursued by various public and private actors.

The purpose of this article is to shed light on how antitrafficking efforts have been instantiated at the local level. This article assesses the record of subfederal prosecutions of trafficking offenses in the United States by looking at state antitrafficking legislation, newspaper coverage of antitrafficking efforts within states, and state trafficking decisions published in online databases in nine different U.S. states from 2004 to 2014.<sup>4</sup> The nine states analyzed in this study—Arizona, California, Georgia, Illinois, Massachusetts, Missouri, New York, Texas, and Washington—were chosen because they represent diverse regions of the country, enacted their trafficking laws at different points in time from 2003 through 2011, and appear to have been driven by different motives in passing their laws.

The first section of this article provides some general historical background on antitrafficking laws, including state-level antitrafficking laws in the United States. The story begins at the international level, with the passage of an international protocol on the subject, and continues with the U.S. government's adoption and subsequent reauthorizations of the Trafficking Victims Protection Act (TVPA) in 2000.<sup>5</sup> But the story does not end with national legislation. Concerned that federal antitrafficking legislation was not broad enough to meet their antiprostitution goals, national organizations seeking enhanced criminalization of prostitution

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4. Because almost all criminal cases in the United States involve plea bargains, most produce no judicial opinions and scant electronically available court records. Moreover, even in those cases where a record of a plea exists and is available, there will be many cases where it would not be obvious that there were threatened charges (such as trafficking charges) that were dropped in exchange for the defendant's agreement not to go to trial on other charges. In short, the cases surveyed here may be only the tip of an iceberg.

5. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1466, 1466-91 (2000) (codified as amended at 22 U.S.C. §§ 7101-7110). The Act has been revised and reauthorized several times: Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) (codified as amended in scattered sections of 8, 18, & 22 U.S.C.); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified as amended in scattered sections of 18, 22, & 42 U.S.C.); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified as amended in scattered sections of 8, 18, 22, & 42 U.S.C.).

pressed for state-level antitrafficking laws. Their efforts coincided with a wave of state and local efforts to expand their own participation in migration control efforts.

Most states enacted their own antitrafficking laws in the decade that followed, but they did so with varying approaches and stated motivations. Some were more concerned with antitrafficking as a means of regulating migration through state criminal law, while others were more concerned with the criminal regulation of prostitution or the protection of victims of sexual exploitation. The second section of the article therefore discusses the varied histories of antitrafficking efforts in each of the states covered by the study, using legislative history and media accounts of antitrafficking efforts to illuminate the nature and scope of each state's legislative efforts. This section then analyzes the implementation of antitrafficking laws at the state level by looking at criminal prosecutions brought under state trafficking laws. The cases involve charges of trafficking as defined in the state and that are available in national electronic databases. These are supplemented with accounts from major newspapers in these states. These cases certainly are not the only state-level ones in which trafficking charges were filed, let alone where the prosecution threatened to file them. Nevertheless, analysis of state trafficking laws, reported cases, and media coverage concerning implementation of these laws provides substantial information about the state-level public narrative of antitrafficking efforts, and therefore offers important insights into how antitrafficking legislation is depicted and understood within each of these jurisdictions.

In an effort to ascertain how concerns about migration might be influencing antitrafficking legislation, this section divides the states under study into two categories: those which enacted antitrafficking legislation with an explicit agenda of furthering state migration control and those that did so for other reasons. This overview shows that although states offered different rationales for their antitrafficking legislation, there has been a great deal of convergence around how these laws have been used. Prosecutors generally use state-level antitrafficking statutes to charge men, often Black men, for trafficking in connection with commercial sex offenses, in fact patterns involving pimping and pandering. Although trafficking law functions discursively as an important component of state-level migration control efforts in some jurisdictions, by and large state prosecutors have tended to target citizens, not noncitizens, for their trafficking prosecutions.

The concluding section of the article briefly explores some of the implications of these findings, and offers suggestions for future research.

Antitrafficking laws have brought needed attention to wide-ranging problems of human exploitation. Like prior iterations of criminal vice regulation, however, the deployment of state criminal laws to achieve antitrafficking goals can also work in ways that perpetuate racially discriminatory policing and migrant criminalization.

## I. THE HISTORY OF SUBFEDERAL TRAFFICKING LEGISLATION

Mounting global attention to the problem of human trafficking in the late 1990s led to the 2000 International Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol).<sup>6</sup> Article 2 of the Trafficking Protocol defined the crime of trafficking as “the recruitment, transportation, transfer, harboring, or receipt of persons through threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, or abuse of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (the means), for purposes of exploitation.”<sup>7</sup> Exploitation, in turn was held to include the exploitation for “prostitution, other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.”<sup>8</sup> There is deliberate ambiguity as to whether trafficking encompasses all prostitution. Also, trafficking may have a transnational element, but it need not. Trafficking can be entirely domestic in nature, although transnational victims may have unique vulnerabilities.<sup>9</sup> In short,

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6. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, S. TREATY DOC NO. 108-16 (2004), 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

7. *Id.* at art. 3, 3b.

8. *Id.* at art. 3b.

9. Gallagher, *supra* note 1, at 822 (“While many individuals are subject to exploitation within their own countries, there is no denying the very particular and acute vulnerabilities—including cultural and linguistic isolation as well as likely irregularity in immigration status—that are particular to situations of exploitation across national borders. . . . In this connection, identifying trafficking itself as a violation of human rights provides an additional basis for protection for those who are subject to exploitation both within and outside their own borders.”).

the definition is broad and provides a great deal of interpretive leeway to state parties seeking to implement the Protocol.

The breadth of the trafficking definition reflects the history of the Protocol negotiations, throughout which the very definition of trafficking was contested. One of the key axes of disagreement was and remains the relationship of trafficking to prostitution.<sup>10</sup> Those antitrafficking advocates whose work has sometimes been characterized as “neo-abolitionism”<sup>11</sup> argue that all prostitution is inherently coercive and that trafficking eradication therefore necessarily requires the simultaneous eradication (or abolition) of prostitution. These neo-abolitionists have pushed back against efforts to characterize trafficked sex as a subset of or parallel to trafficked labor, and have instead promoted the eradication of all prostitution as the central component of antitrafficking efforts. An internally heterogeneous group of nonabolitionists, in contrast, have argued for the inclusion of “sex work” within the rubric of antitrafficking law only when that work is identified as coercive in ways that mirror such findings when made with regard to other forms of labor. Existing scholarship has highlighted how national antitrafficking legislation has been shaped, in no small part, by the extent to which neo-abolitionist and nonabolitionist approaches are politically dominant.<sup>12</sup>

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10. Chacón, *supra* note 2, at 3027–32 (discussing the diverging views on this question); see also Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010); Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337 (2007).

11. The antiprostitution movement uses the term “neo-abolitionism” to invoke parallels to the slave abolitionist movements of prior centuries, and as such, is also controversial. See, e.g., Aya Gruber, Amy J. Cohen, & Kate Mogulescu, *An Experiment in Penal Welfare: The New Human Trafficking Intervention Courts*, 68 FLA. L. REV. (forthcoming 2016) (manuscript at n.1), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2776870](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776870).

12. See, e.g., Erin O’Brien, *Prostitution Ideology and Trafficking Policy: The Impact of Political Approaches to Domestic Sex Work on Human Trafficking Policy in Australia and the United States*, 36 J. WOMEN, POL. & POL’Y 191 (2015) (noting the relative strength of neo-abolitionists in the United States as compared to Australia, and describing disparate policy outcomes); see also Chuang, *supra* note 10 (documenting and critiquing the ascendancy of neo-abolitionist approaches in the United States). Abolitionists strongly criticize the very idea of “sex work” as distinct from prostitution. See, e.g., James Warren, *Raising Awareness of Sex Trafficking One Lecture at a Time*, N.Y. TIMES, Nov. 25, 2011, A27 (reporting on Chicago lecture by Professor Catharine MacKinnon in which “she pilloried some academics’ notion of prostitutes as ‘sex workers’ who act voluntarily and gain a certain liberation, even sexual equality, by being compensated.”).

But there are other important definitional ambiguities that signify additional social fissures around the trafficking definition. Because of the breadth and malleability of trafficking definitions and the disparate interests of the individuals who have worked together to craft those definitions, cross-border trafficking continues to raise vexing questions concerning the distinction between smuggling and trafficking.<sup>13</sup> Definitional uncertainty also exists about the distinction between trafficked migrant workers and workers subject to lesser forms of wage and workplace violations.<sup>14</sup> From their inception, international legal efforts to regulate trafficking have generated thorny questions about whether unauthorized cross-border migrants caught in exploitative working conditions would be identified and treated as trafficking victims worthy of protections, or as violators of international sovereignty subject to punishment.<sup>15</sup> Relative to the literature focusing on the relationship between prostitution and trafficking, that which examines questions about the appropriate treatment of cross-border migrants under trafficking legislation is less developed. Yet how those questions are answered can determine in important ways how noncitizens fare in the criminal justice system.

Given these definitional ambiguities, the legal context of the Trafficking Protocol has played an important role in defining the socio-legal contours of trafficking. The Protocol was situated within the framework of a larger international effort by state actors to develop global instruments of cooperation focused on transnational crime, and structured to “supplement[] the United Nations Convention against Transnational Organized Crime.”<sup>16</sup> The Crime Convention, in turn, had been developed in response to States’ growing concerns that their sovereign reach was insufficient to allow for effective prevention and prosecution of the transnational criminal activities that affected their interests.<sup>17</sup> The Convention was intended both to increase

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13. Chacón, *supra* note 2 (discussing the troubled definitional line between trafficking and smuggling).

14. Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1 (2009).

15. *Id.*; see also Chacón, *supra* note 2; Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558 (2016) (outlining the structural coercion experience by undocumented workers).

16. Trafficking Protocol, *supra* note 6, pmbl., at 343.

17. See Comm. On Crime Prevention & Criminal Justice, *International Cooperation in Combating Transnational Crime: Implementation of the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime: Questions of the Elaboration of an International Convention Against Organized Transnational Crime and Other Possible*

international cooperation and to extend the reach of sovereign states with regard to “transnational organized crime.”<sup>18</sup> It explicitly legitimated and extended States’ sovereign powers to police national interests across borders.

The decision to design the Trafficking Protocol as a supplement to a transnational crime convention was not inevitable. Some advocates would have preferred to decouple antitrafficking efforts from international crime control efforts; they favored situating the antitrafficking instrument within a human rights framework. These advocates expressed concern that the Organized Crime Convention’s goal of strengthening sovereign power was actually in tension with the project of transnational victim protection.<sup>19</sup> On the other hand, a sufficient number of campaigners for trafficking victims viewed the coupling of antitrafficking efforts with the Crime Convention as the best possible way to ensure State parties’ participation in antitrafficking efforts.<sup>20</sup> Ultimately, interest convergence between antiprostitution activists who favored the criminal law framework, trafficking victims advocates concerned about the inadequacy of existing protective mechanisms, governmental representatives of state parties interested in extending their sovereign reach, and influential law enforcement voices led to the inclusion of the Trafficking Protocol as a supplement of the Crime Convention.<sup>21</sup> The U.N. Office on Drugs and Crime is the guardian agency for the Protocol.

Like most putatively transnational crimes, trafficking offenses are not prosecuted in international courts; they are prosecuted in domestic courts.<sup>22</sup> The efficacy of the Protocol largely depended upon state parties’ fulfillment of their obligations to develop domestic antitrafficking laws.<sup>23</sup>

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*International Instruments*, 5–8, U.N. Doc. E/CN.15/1998/6 (Mar. 23, 1998), available at <http://www.uncjin.org/6e.pdf>.

18. The meaning of “transnational organized crime” was an important point of negotiation during the drafting of the Protocol. *Id.* at ¶ 13. Ultimately, state parties adopted a broad and trans-substantive definition. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 08-16 (2004), 2225 U.N.T.S. 209.

19. See, e.g., James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1 (2008).

20. Gallagher, *supra* note 1, at 828–29.

21. *Id.*

22. See Gallagher, *supra* note 1, for the distinction between enslavement, which can be prosecuted internationally, and trafficking, which cannot.

23. Trafficking Protocol, *supra* note 14, art. 5; U.N. OFFICE ON DRUGS & CRIME, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at

The meaning of the Protocol is, in turn, largely given its practical content by enforcement efforts at the national and subnational level.

In 2000, the United States developed domestic implementing legislation to give effect to the Protocol: the Trafficking Victims Protection Act (TVPA).<sup>24</sup> In the fifteen years following the enactment of the TVPA, the United States government prosecuted hundreds of defendants for trafficking-related offenses.<sup>25</sup> But antitrafficking efforts have not been limited to federal governmental actors. In the lead-up to federal Congressional reauthorizations of the TVPA in 2003 and 2005, antitrafficking advocates centrally concerned with the abolition of the commercial sex industry lobbied unsuccessfully for the federalization of criminal prosecutions for crimes like pandering, pimping, and other prostitution-related offenses under the TVPA.<sup>26</sup> Those commercial sex crimes are not covered by the federal TVPA's definition of trafficking, which mirrors the Trafficking Protocol in its requirement of an element of force, fraud, coercion, or like means—an element that is formally lacking in many commercial sex offense crimes. These efforts to federalize broad categories of sex crimes were opposed by the Department of Justice, many state and local law enforcement agencies, and some conservative think tanks on the grounds that it would unduly expand the federal crime-fighting mandate.<sup>27</sup> Ultimately, the efforts to expand the federal law in these ways failed.

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270, U.N. Sales No. E.05.V.2 (2004); see also Gallagher, *supra* note 1, at 812 (noting that although international cooperation in antitrafficking efforts is limited to transnational trafficking crimes, the “central and mandatory obligation of all State Parties to the Protocol is to criminalize trafficking in their domestic legal systems.”). Gallagher additionally notes that, as of 2007, over 100 countries had indeed adopted criminal prohibitions on trafficking since the adoption of the Protocol. *Id.* at 813.

24. See *supra* note 5.

25. The most commonly prosecuted trafficking charge has been 18 U.S.C. § 1591, which criminalizes sex trafficking of children by force, fraud, or coercion. There are over 600 reported federal criminal cases involving this charge in the period from 2009 to 2013, while in the same period, there are only a handful of prosecutions on each of the other trafficking-related charges, including 18 U.S.C. §§ 1581 (peonage, obstructing enforcement), 1584 (sale into involuntary servitude), 1589 (forced labor), 1590 (trafficking with respect to peonage, involuntary servitude, and forced labor), and 1592 (trafficking-related document offenses).

26. Chuang, *supra* note 10, at 1692–93.

27. *Id.* Some antitrafficking advocates also opposed the proposal to expand federal criminal jurisdiction in this way, fearing that it would divert federal enforcement resources away from the prosecution of crimes involving the use of force, fraud, or coercion in favor of the prosecution of a broad range of prostitution-related offenses. *Id.* Supporters of

Supporters of more expansive trafficking laws thus focused their energies in new directions. First, they lobbied for federal funding of state-level antitrafficking efforts. Accordingly, when Congress passed the 2005 reauthorization of the federal TVPA, it included the appropriation of \$25 million in fiscal years 2006 and 2007 for state and local governments to educate their constituents about trafficking, to investigate trafficking crimes, and to initiate state prosecutions of individuals who purchase sex.<sup>28</sup> Second, they lobbied for state-level antitrafficking legislation. The Department of Justice under President George W. Bush supported these efforts and, indeed, devised model antitrafficking legislation for states that was broader than federal antitrafficking criminal laws.<sup>29</sup> At present, each state in the United States has its own antitrafficking legislation.<sup>30</sup>

Although every U.S. state has enacted antitrafficking legislation, the laws vary in form and content. In describing state antitrafficking laws, a 2013 report for the American Bar Association reported that “the laws are as varied as the states themselves.” The report continues:

The definitions of human trafficking and the elements widely differ. The TVPA and the UN Palermo Protocol define human trafficking to include both labor and sex trafficking. Yet some states include only sex trafficking and not labor trafficking, even though it is estimated that labor trafficking accounts for 78 percent of all trafficking globally. Some laws only address sex trafficking of minors. Others conflate smuggling and trafficking, which are in fact distinct crimes. The vast majority of state trafficking laws do not include victim assistance, a private right of action, or protection from arrest based on offenses committed as a result of being victimized.<sup>31</sup>

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federalization argue that prostitution is always inherently coercive and that therefore all prostitution prosecutions are properly prioritized as trafficking prosecutions.

28. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558, § 201(a) (2006) (codified as amended at 42 U.S.C. § 14044c).

29. Jennifer A. Kuhn & Alison L. Stankus, *Effective Implementation of the Trafficking of Persons and Involuntary Servitude Articles: Lessons from the Criminal Justice System Response to the Illinois Domestic Violence Act*, 28 N. ILL. U. L. REV. 215, 220–21 (2008).

30. POLARIS PROJECT, *A Look Back: Building a Human Trafficking Legal Framework 2*, fig. 1 (2014), <https://polarisproject.org/sites/default/files/2014-Look-Back.pdf>. Most of these statutes—in 43 of 50 states—were enacted in the period from 2004 through 2009. For a list of these statutes, see Jennifer M. Chacón, *Tensions and Tradeoffs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609 (2010).

31. Kelly Heinrich & Kavitha Sreeharsha, *The State of State Human Trafficking Laws*, 52 JUDGES’ J. 1 (2013), available at [http://www.americanbar.org/publications/judges\\_journal/](http://www.americanbar.org/publications/judges_journal/)

The disparate nature of these laws may be explained at least in part by state legislators' diverse motivations for enacting antitrafficking laws. The following section outlines two divergent paths by which the states in this study arrived at their enactments of antitrafficking legislation and then traces the subsequent enforcement of these laws.

## II. ENACTMENT OF STATE ANTITRAFFICKING LEGISLATION

Although all the U.S. states in this study, and indeed, across the country, were spurred into action by some combination of antitrafficking activism and federal financial incentives, they offered varying justifications for enacting antitrafficking legislation. The states selected for this study were chosen with an eye toward the distinct rationales offered by state legislators for enacting their antitrafficking laws. One group—characterize herein as “migration control states”—introduced antitrafficking legislation in the context of a broader package of restrictionist immigration laws.<sup>32</sup> The second group enacted their antitrafficking laws to expand criminal liability for acts defined as trafficking with the stated goal of protecting trafficking victims—often with a heavy or exclusive emphasis on sex trafficking. Consistent with the model offered by the international framework, every state used criminal sanctions as the centerpiece of their antitrafficking efforts, and in every state, victim protection is connected to the goal of prosecuting traffickers.

### A. Migration Control States

In the United States, the federal government has exclusive power to enact immigration laws.<sup>33</sup> Although states have the power to regulate many

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2013/winter/the\_state\_of\_state\_humantrafficking\_laws.html; *see also* Chacón, *supra* note 30, at 1643–50 (documenting the statutes enacted in the period from 2004 through 2010).

32. I use the term “restrictionist” to refer to laws designed to discourage unauthorized migrants from entering the state and to punish unauthorized migrants in the state in the hope that they “self-deport.” In contrast, “integrationist” laws are those designed to ease the integration of all migrants—including unauthorized migrants—to the extent permitted by federal law.

33. *Arizona v. United States*, 132 S. Ct. 2492 (2012) (“The federal power to determine immigration policy is well settled.”).

matters that affect the lives of noncitizens—including education, criminal law, labor law, and employment law—they cannot legislate immigration restrictions and have no capacity to deport noncitizens, nor do they have independent authority to enforce federal immigration law.<sup>34</sup> Moreover, any state legislation that facially distinguishes on alienage grounds must survive strict judicial scrutiny, meaning that the state must show that the discriminatory legislation is narrowly tailored to achieve a compelling state interest.<sup>35</sup>

Federal immigration legislation has been introduced unsuccessfully several times over the past decade in efforts to address concerns regarding the large and relatively stable population of unauthorized migrants in the country, currently estimated at 11.2 million.<sup>36</sup> Federal legislative packages have generally included some combination of regularization with a path to citizenship for some migrants, and increased enforcement for those ineligible for regularization, along with increased border enforcement measures.<sup>37</sup> Political opponents of large-scale legalizations have leveraged the political opposition of some members of the House of Representatives to stymie federal legislative reform efforts. At the same time, many of these same organizations and individuals have put pressure on state and local governments to enact their own forms of immigration control within the limits of federal law.<sup>38</sup> In the years following the failure of federal immigration reform in the 2006–2007 legislative session, numerous states and

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34. *Id.*

35. Compare *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down state laws that distinguished on grounds of alienage for failure to satisfy strict scrutiny review under the 14th Amendment Due Process Clause), with *Mathews v. Diaz*, 426 U.S. 67 (1976) (affirming a federal statute distinguishing on the basis of alienage subject to only rational basis review).

36. On the estimated size of the unauthorized immigrant population in the United States, see Jeffrey S. Passel et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, PEW RESEARCH CENTER, Sept. 3, 2014, <http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/>.

37. See, e.g., Immigration Reform Act of 2004, S. 2010, 108th Cong. (2004); SOLVE Act of 2004, H.R. 4262, 108th Cong. (2004); Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007). Most recently, a bill passed the Senate in the summer of 2013, but the House of Representatives took no action on the bill; Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

38. For a discussion of the integrated political strategy of working to block federal reform efforts while promoting state and local enforcement initiatives, see PRATHEPAN GULASEKARAM & KARTHICK RAMACHANDRA, *THE NEW IMMIGRATION FEDERALISM* (2014).

localities therefore enacted legislation to indirectly regulate immigration by making life more difficult for noncitizens—particularly those lacking legal authorization to be in the United States.<sup>39</sup>

The challenge for states was to find mechanisms for regulating migration indirectly in ways that did not conflict with federal immigration laws or exceed the state’s authority under the federal constitution. Some state and local initiatives, like much of the famed Arizona S.B. 1070, clearly exceed the scope of state power and have been struck down in the courts.<sup>40</sup> But other initiatives—particularly criminal law provisions that are alienage neutral on their face—have been more successfully leveraged to target noncitizens.

The wave of restrictionist activity at the state and local level in the period following the failed immigration reform efforts of 2006–2007 largely coincided with the period in which the federal government was encouraging states to enact state-level antitrafficking laws. Perhaps it is unsurprising, then, that in some jurisdictions, antitrafficking laws were promoted as a vehicle of legitimate and indirect subfederal immigration regulation. Among the states surveyed in this article, Arizona, Georgia, Missouri, and Texas provide examples of states that enacted antitrafficking legislation as a part of a broader package of state-level legislation devised to enable states to use their criminal laws to regulate migration, notwithstanding the purportedly exclusive role of the federal government in regulating migration into and within the United States. In “migration control states,” the goal of victim protection appeared subsidiary to the goal of prosecuting noncitizen traffickers and using antitrafficking legislation as a *de facto* form of migrant control.

### 1. Arizona

When the Arizona legislature passed its first human trafficking law, legislators made clear that they intended the measure as a criminal law tool for the prosecution of migrants. The Senate news report, issued by the Arizona Senate upon passage of the 2005 human trafficking law, contained three statements in support of the legislation. Senator Jarrett characterized the legislation as “more tools to *stem the tide* of the unspeakable act of human trafficking,” implicitly invoking the image of migrant flows with this

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39. *Id.*

40. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492 (2012).

language.<sup>41</sup> The other two senators quoted in the House press release were more explicit. Senator Bee said, “We have accomplished our goal to get a bill passed in the legislature that hits hard at the criminal activities of ‘*coyotes*.’<sup>42</sup> The heinous act of human trafficking greatly exacerbates an already difficult illegal immigration problem. Too often it leads to death and abuse of its victims, the destruction of property and natural resources, and places a terrible burden on the taxpayers of Arizona.”<sup>43</sup> Representative Paton said, “By sending this bill to the Governor, we have taken a big step toward providing important tools to attack the exploitation of migrant workers and reduce illegal immigration.”<sup>44</sup> The latter two statements largely conflate trafficking and smuggling and link antitrafficking to migration control efforts.

This conflation of smuggling and trafficking became a centerpiece of the Maricopa County Sheriff’s Department law enforcement strategy around trafficking, with trafficking frequently serving as the justification for using state criminal law as a means of targeting unauthorized migrants present in the state.<sup>45</sup> Contemporaneous media commentary in Arizona followed the lead of elected officials and law enforcement agents, and frequently linked state and local participation in immigration enforcement efforts with anti-trafficking goals.<sup>46</sup>

Notwithstanding the initial focus on criminalization of migrants rather than victim assistance, Arizona does have a Human Trafficking Victim Assistance Fund separate from the general fund.<sup>47</sup> The law’s provisions

41. News Release, Ariz. S. Republican Caucus, Human Trafficking Legislation Passes (Mar. 9, 2005).

42. *Coyotes* is a term often used to refer to migrant smugglers in Latin America.

43. *Id.*

44. *Id.*

45. See Terry Carter, *The Maricopa County Courthouse War*, 96 A.B.A. J. 43, 46–47 (Apr. 2010) (noting that Sheriff Joe Arpaio posted signs on official MCSO vehicles that read, “Help Sheriff Joe Arpaio fight illegal immigration and trafficking. Call 602.876.4154 with any info/tips on illegal aliens.”).

46. See, e.g., Howard Fischer, *DPS Links with Feds to Fight Human Trafficking*, AZ. DAILY SUN, July 6, 2005. (“State police will be teaming with federal agents to take illegal entrants off the hands of local police. . . . The plan unveiled Wednesday by Gov. Janet Napolitano involves a dozen officers of the Department of Public Safety who will be specially cross-trained to enforce federal immigration laws. . . . These two-person teams also will target what DPS spokesman Rick Knight called ‘violent human traffickers.’”).

47. ARIZ. REV. STAT. ANN. § 41-114 (2016) (West).

do not exclude noncitizens from services, but the anti-immigrant climate in the state, and particularly in Maricopa County, may serve as a de facto barrier to unauthorized migrants receiving state fund assistance. For example, in the same year that the victim fund was created by law, Arizona's Taxpayer and Citizen Protection Act or Proposition 200, went into effect,<sup>48</sup> requiring state government employees to report unauthorized migrants to federal officials upon receipt of information confirming a person's status, and criminalizing the failure to report as a misdemeanor.<sup>49</sup> This and other aspects of Arizona law discourage noncitizen victims from seeking law enforcement intervention and financial assistance from state entities.

## 2. Georgia

Georgia's antitrafficking laws were also enacted as part of a very restrictive immigration bill—the Georgia Security and Immigration Compliance Act.<sup>50</sup> Contemporary press accounts contain headlines like “House passes bill on illegals” and describe the measure as an effort on the part of the legislature to “confront illegal immigration,”<sup>51</sup> even though the text of the trafficking legislation is clearly modeled upon the Department of Justice's model antitrafficking statute, which is not at all focused on immigration control.<sup>52</sup>

There have been several subsequent additions to the Georgia antitrafficking statute. For example, in 2011 the legislature increased the penalties for trafficking, expanded the definition of coercion, explicitly stated that lack of knowledge of a victim's age is not a defense to trafficking charges, and imposed rigorous bars to introducing evidence pertaining to the sexual history or history of commercial sexual activity of an alleged victim or of the alleged victim's familial relationship to the accused.<sup>53</sup> This bill, which reflects a clear shift in the antitrafficking focus from migration control to

48. ARIZ. REV. STAT. ANN. § 46-140.01 et seq. (2004) (West).

49. ARIZ. REV. STAT. ANN. § 46-140.01(A)(1), (4) (2004) (West).

50. 2006 Ga. Laws 457 (codified as amended in GA. CODE ANN. §§ 13, 16, 35, 42, 43, 48, & 50 (West 2006)).

51. Jim Tharpe & Carlos Campos, *Legislature 2006: House Passes Bill on Illegals—Senate Prepares to Iron Out Differences*, ATLANTA J. CONST., Mar. 24, 2006, at 1A (characterizing the bill as an effort by the Georgia legislature to “confront illegal immigration”).

52. See *supra* text accompanying note 29.

53. 2011 Ga. Laws 54 (codified as amended in GA. CODE ANN. §§ 16, 17, 35 (West 2011)).

criminalization of commercial sex-related trafficking, passed nearly unanimously<sup>54</sup> at a time when state-federal collaborations and federal funding of state-level antitrafficking initiatives were expanding in Georgia.

### 3. Missouri

Missouri's antitrafficking efforts did not start out as migration control efforts, but soon took on that cast. The first Missouri law criminalizing trafficking arose out of a bill that aimed to strengthen tools for prosecuting the kidnapping of children, in response to a high-profile 2004 kidnapping incident.<sup>55</sup> Trafficking-related offenses were added to the bill during the amendment process, criminalizing forced labor, trafficking for the purposes of involuntary servitude, trafficking for the purposes of sexual exploitation, sexual trafficking of a child, and contributing to human trafficking through the misuse of documentation. A search of online databases revealed no electronically published decisions for prosecutions brought under this version of the law.

In 2008, during the wave of state-level enactments of restrictionist immigration laws, the Missouri legislature added a provision that criminalized the "trafficking" of "any illegal alien who is not lawfully present," effectively expanding the trafficking law into an antismuggling provision in cases involving noncitizens.<sup>56</sup> In 2011, Missouri pivoted back to a focus on commercial sex-related exploitation,<sup>57</sup> and with that pivot away from migration, for the first time provided aid to trafficking victims "insofar as funds are available for that purpose."<sup>58</sup>

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54. News Release, Ga. H.R., House Passes Legislation Targeting Human Trafficking (Mar. 2, 2011). The only controversy raised was one conservative think-tank's concern that the "definition of sexual servitude was written so as to give a pass to teenagers in prostitution who were working at their own volition." *Minutes of the Senate Health and Human Services Committee*, 2011–12 Reg. Sess. (Ga. Mar. 22, 2011). This is, of course, the very point for the many antitrafficking and juvenile justice advocates who argue that minors by definition cannot consent to these commercial sex acts and therefore are inherently coerced into sex.

55. 2004 Mo. Legis. Serv. H.B. 1487 (West 2011) (enacted 2004). Mo. H.R., *Summary of the Truly Agreed Version of the Bill*, 92 Gen. Assemb., 2nd Reg. Sess. (Sept. 23, 2004); see also *Senate Passes New Child Kidnapping Provision*, SOUTHEAST MISSOURIAN, May 6, 2004, <http://www.semissourian.com/story/136939.html>; 'Child Kidnapping' Measure Advances, COLUMBIA DAILY TRIBUNE, May 6, 2004, <http://archive.columbiatribune.com/2004/May/20040506News022.asp>.

56. MO. ANN. STAT. § 577.675 (West 2016) (enacted 2008).

57. H.B. 214, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

58. MO. ANN. STAT. § 577.675 (West 2016) (enacted 2011).

#### 4. Texas

Antitrafficking legislation in Texas came relatively early and in response to concerns about migrant smuggling. The first Texan statute criminalizing human trafficking, H.B. 2096, originally arose in response to a 2002 incident in which Dallas-area police discovered a tractor-trailer containing the bodies of nineteen people who had died from heat-related causes after being trapped in the un-airconditioned trailer for hours while being smuggled across the U.S.-Mexico border.<sup>59</sup> Unsurprisingly, the original bill introduced in response narrowly focused on the smuggling of humans across the border in these trailer-type vehicles. However, an amendment was added on the Senate floor that broadened the scope of the legislation. The added sections defined “forced labor or services” and “traffic,” and criminalized both sex and labor trafficking.<sup>60</sup> The trafficking language was added to the Bill on the Senate floor on May 21, 2003, and no further discussion occurred prior to the bill being sent to the governor just six days later.<sup>61</sup> Media accounts in the years that follow frequently conflated trafficking and smuggling.<sup>62</sup> Accounts of transnational gang involvement in smuggling/trafficking activity regularly surface in these stories.<sup>63</sup>

In 2011, S.B. 24 passed, substantially changing the Penal Code sections dealing with human trafficking. Penal Code Section 20A.02 was rewritten to clearly distinguish between labor trafficking and sex trafficking. Much of this bill focused on creating additional penalties for those convicted of sex trafficking, including adding the convicted individuals to the sex offender registry and increasing penalties for prostitution of a child. The statute also distinguishes between adult and child sex trafficking victims, and provides that in cases involving victims under the age of 18, the prosecution does not have to show the element of “force, fraud, or coercion.”<sup>64</sup> That same year,

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59. TEX. HOUSE TRANSPORTATION COMMITTEE REPORT, H.B. 2096, 78th Legis., 2003 Reg. Sess. (Tex. 2003).

60. TEX. PENAL CODE ANN. §§ 20A.01 & 20A.02 (West 2016).

61. SUMMARY, H.B. 2096, 78th Legis., 2003 Reg. Sess. (Tex. 2003).

62. See, e.g., *Stiffen the Penalties for Human Traffickers*, SAN ANTONIO EXPRESS NEWS, Aug. 9, 2005 (discussing cross-border smuggling, but calling it both smuggling and “human trafficking.”).

63. See, e.g., Jazmine Ulloa, *Cartel’s Sway in Austin Growing in Size, Complexity*, AUSTIN AMERICAN STATESMAN, Apr. 15, 2013, at A1 (discussing the Zetas and other Mexican gang or cartel involvement in “offenses such as drugs, firearms and human smuggling and trafficking.”).

64. TEX. PENAL CODE ANN. § 20A.04 (West 2016).

El Paso, Texas, was selected by the Department of Justice as one of six cities that would participate in joint Anti-Trafficking Coordination Teams with the Department of Homeland Security (known as ACTeams).<sup>65</sup> Other cities also created human trafficking task forces.<sup>66</sup>

After 2011, there was a notable upswing in cases prosecuted under Texas Penal Code Sections 20A.01 and 20A.02. By 2013, local papers began carrying a significant number of stories about trafficking prosecutions, noting the role of joint task forces involving the FBI and local police,<sup>67</sup> and increasingly identifying transnational gangs as a focal point of trafficking activity.

### **B. Sex (and Labor?) Trafficking Victims' Protection States**

The four previous cases provide examples of states using trafficking legislation to address concerns about illegal migration and human smuggling. In contrast to the states described above, California, Illinois, New York, Massachusetts, and Washington introduced their antitrafficking bills as extensions of the federal antitrafficking law and with a purported concern about ending human exploitation, particularly sexual exploitation. Concerns about noncitizens also surfaced in the passage of their laws, but in very different ways. Specifically, unauthorized migrants—and particularly women and children—were often presented as the emblematic victims in trafficking cases. In this framing, however, the purpose of criminal legislation was not necessarily to target unauthorized migrants for criminal prosecution, but rather, to protect vulnerable migrants and other victims.

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65. See Press Release, Dep't of Justice, Departments of Justice, Homeland Security and Labor Announce Selection of Phase II Anti-Trafficking Coordination Teams (Dec. 17, 2015), <https://www.justice.gov/opa/pr/departments-justice-homeland-security-and-labor-announce-selection-phase-ii-anti-trafficking>. The other cities were Atlanta, Georgia; Kansas City, Missouri; Los Angeles, California; Memphis, Tennessee; and Miami, Florida. *Id.* As DOJ noted, in the period 2011–2015, “the number of defendants convicted rose 86 percent in ACTeam districts, compared to 14 percent in non-ACTeam districts, and 26 percent nationwide.” *Id.*

66. See, e.g., Blotter, *AUSTIN AMERICAN-STATESMAN*, Nov. 3, 2014 at B3 (discussing trafficking arrest made by an undercover police officer in “Austin’s Human Trafficking Unit.”).

67. See, e.g., Guillermo Contreras, *Prosecutions Rise for Sex Trafficking; Officials Stepping Up Battle*, *SAN ANTONIO EXPRESS-NEWS*, Dec. 26, 2013, at A1.

## 1. California

California passed the California Trafficking Victims Protection Act in 2005. The legislature used the Department of Justice's model legislation as the basis for the criminal provisions of the bill.<sup>68</sup> To substantiate the need for the law, the bill's drafters cited both Department of Justice statistics and an academic report that outlined the serious and pervasive nature of human trafficking in the United States and California.<sup>69</sup> Notably, that report focused largely on forced labor trafficking and the fact that victims were often individuals brought to the state from overseas.<sup>70</sup> The report also found that 47.4 percent of victims were engaged in prostitution or the selling of sexual services.<sup>71</sup>

The 2005 bill based its definition of "criminalized trafficking" on the definition of "severe forms of human trafficking" under the federal TVPA. The initial law did not differentiate between forced labor and sexual servitude, although the citizens of the state modified the bill to create such a distinction (and to punish sex trafficking more harshly) through the Proposition 35 ballot initiative in 2012.<sup>72</sup>

California's 2005 legislation made human trafficking victims eligible for the Victims of Crime Program, which disburses restitution to victims of certain crimes. The 2005 bill also required convicted traffickers to pay restitution to victims in the amount the victim would have legally earned or the actual money derived by the defendant from the exploitation of the victim.<sup>73</sup>

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68. CALIFORNIA BILL ANALYSIS, SENATE COMMITTEE ON PUBLIC SAFETY, A.B. 22, 2005–2006 Reg. Sess. (Cal. June 21, 2005).

69. UNIV. OF CAL., BERKELEY HUMAN RIGHTS CTR., FREEDOM DENIED: FORCED LABOR IN CALIFORNIA (Feb. 2005).

70. *Id.*

71. *Id.*

72. Labor trafficking has a maximum penalty of twelve years per offense, while sex trafficking has a maximum penalty of twenty years per offense under Prop 35. Prop 35 also increased the fines related to human trafficking convictions and required that 70 percent of those fines be allocated to governmental agencies and nonprofit organizations that directly provide services to victims. The remaining funds are to be allocated to local jurisdictions to fund prevention, witness protection, and rescue missions related to human trafficking investigations.

73. CAL. PENAL CODE § 1202.4(f) (West 2016).

## 2. Illinois

Illinois' first trafficking statute did not become effective until 2009. The state legislature modeled the Illinois Trafficking of Persons and Involuntary Servitude Act of 2009 on the federal model trafficking statute.<sup>74</sup> Several trafficking-related incidents that occurred in the Chicago area helped to prod the state legislature to act. Publicized events included the trafficking of a woman from Latvia to the Chicago area, who was forced to become an exotic dancer and hand over her wages to her traffickers, and the sex trafficking of a Chicago teenager.<sup>75</sup>

The Act criminalized involuntary servitude for labor or services (which included sex under the statute as initially enacted); involuntary sexual servitude of a minor; and trafficking in persons for purposes of involuntary servitude or sexual servitude of a minor. The legislation also facilitated victims' ability to collect restitution from trafficking defendants.<sup>76</sup> Illinois law also contains a surprisingly rare "safe harbor" provision shielding minor victims of trafficking from prosecution.<sup>77</sup>

## 3. Massachusetts

Massachusetts was one of the last states to pass an antitrafficking law, doing so only in 2011. According to the legislative history, it took almost six years for the legislature to enact a bill. That bill was influenced by the introduction of the federal Domestic Minor Sex Trafficking Deterrence and Victims Support Act.<sup>78</sup> To qualify for federal assistance under this proposed

74. See Kuhn & Stankus, *supra* note 29.

75. *Id.* at 217.

76. Meribah Knight, *Campaign Against Sex Trafficking is Gaining*, N.Y. TIMES, Aug. 14, 2011, at A21 (noting that under the 2006 Illinois Predator Accountability Act, trafficking victims can "file civil suits for punitive damages against suspected sex traffickers, those who pay for prostitutes, strip club proprietors and Web site publishers who knowingly benefit from the sex trade—even if no criminal charges have been filed against them.").

77. 720 ILL. COMP. STAT. 5/11-14(d) (2012). Given that most U.S. jurisdictions criminalize statutory rape on the theory that minors cannot consent to sex, it seems anomalous that minors in these same jurisdictions generally can be prosecuted for the prostitution offenses.

78. That bill, introduced in the Senate as S. 596, has never actually been enacted into law. It would have established a six-state pilot program aimed at assisting states in providing comprehensive services to minor victims of trafficking coerced into commercial sex, while increasing criminal sanctions for those who trafficked them into sex through coercion.

legislation, states would have been required to have a workable foundation in place for providing trafficking victim services. Although the federal legislation never passed, Massachusetts's 2011 bill aimed to make Massachusetts eligible for federal assistance under that law, and focused extensively on sex trafficking and services for victims.<sup>79</sup>

The 2011 statute criminalized both trafficking for sexual servitude and trafficking for forced labor, as well as trafficking for organ removal and sale, and enticing a minor using electronic communications into becoming a victim of human trafficking.<sup>80</sup> The bill also provides an extensive list of fines for activities such as the solicitation of an adult prostitute and the involvement or benefit of trafficking by a corporation. The fines provide resources for victims and fund a statewide trafficking task force.

By 2012, only twenty-nine people had been prosecuted under the Act.<sup>81</sup> At that time, the Act was amended to clarify and broaden many of the methods of control described in the provisions of the Act defining the means of trafficking.<sup>82</sup> Although the language in the amendment broadened the involuntary servitude provision so that it now applies to either labor or sex trafficking scenarios, the discussion on the floor of the House focused mainly on the methods used by pimps and others benefitting from sex trafficking. Two defendants convicted under the 2012 law after profiting from the prostitution acts of others challenged the constitutionality of Section 50 on vagueness grounds, but the Massachusetts Supreme Court rejected their constitutional argument.<sup>83</sup>

The bill also amended the definition of "sex offense" to cover activities including commercial sexual activity, a sexually explicit performance, or the production of pornography. The Act was further amended in 2014 to state that an individual under the age of 18 could not be charged with solicitation of a sex act if the underlying act only involved the prostitution of that

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79. Lisa Redmond, *Bill Would Protect Children in the Sex-Trade Industry*, LOWELL SUN, Dec. 10, 2010, [http://www.lowellsun.com/rss/ci\\_16972862](http://www.lowellsun.com/rss/ci_16972862).

80. MASS. GEN. LAWS ch. 265, §§ 53, 26D (2012).

81. Ashley Griffin, *Chicago Is One of the Leading Cities in this Global Epidemic*, ILLINOIS ISSUES, June 2012, <http://illinoisissues.uis.edu/archives/2012/06/trafficking.html>.

82. H.B. 5278, 97th Gen. Assemb. (Ill. 2012).

83. The two defendants, Tyshaun McGhee and Sidney McGee, were accused of trafficking women for sexual servitude and profiting from prostitution. *See Commonwealth v. McGhee*, 35 N.E.3d 329 (Mass. 2015).

individual's own body, thus incorporating a "safe harbor" provision into Massachusetts law.<sup>84</sup>

#### 4. New York

The antitrafficking legislation enacted by the New York Legislature in 2007 created the class B felony of sex trafficking<sup>85</sup> and the class D felony of labor trafficking.<sup>86</sup> As in California, Illinois, and Massachusetts, when the New York legislature enacted criminal laws designed to address human trafficking issues, the legislature also enacted laws designed to assist human trafficking victims.<sup>87</sup> In addition to creating new crimes relating to sex and labor trafficking, the bill also had a provision for victims' services and created a task force to coordinate and oversee implementation of the new law.<sup>88</sup> New York also enacted a safe harbor provision to prevent the criminal prosecution of minors for sex trafficking crimes,<sup>89</sup> although the efficacy of that provision is the subject of debate.<sup>90</sup>

As in California, legislative history and the actual provisions of the bill are immigrant-friendly in tone and content. The resulting legislation acknowledges the particular vulnerabilities of noncitizen victims. The legislation lists "withholding or destroying immigration documents" as a form of coercion punishable under the law.<sup>91</sup> It also provides for assistance to noncitizen victims in the period before they are certified as trafficking victims under federal law, thus filling a temporal gap in which noncitizens not yet certified as victims by the federal government remain ineligible for governmental assistance, and therefore vulnerable.<sup>92</sup> Victims of trafficking

84. S.B. 3558, 98th Gen. Assemb. § 14.1(d) (Ill. 2014).

85. N.Y. PENAL LAW § 230.34 (McKinney 2016).

86. N.Y. PENAL LAW § 135.35 (McKinney 2016).

87. See N.Y. SOC. SERV. LAW §§ 483-aa, 483-bb, 483-cc, & 483-dd (McKinney 2016).

88. *Id.*

89. New York Safe Harbor for Exploited Children Act, ch. 569, 2008 N.Y. Laws 4067 [hereinafter N.Y. Safe Harbor Act] (codified as amended in scattered sections of N.Y. SOC. SERV. LAW and N.Y. FAM. CT. ACT).

90. See, e.g., Marihug Cedeño, *Note, Pimps, Johns and Juvenile Prostitutes: Is New York Doing Enough to Combat the Commercial Sexual Exploitation of Children?*, 22 CORNELL J.L. & PUB. POL'Y 153 (2012).

91. *Id.*

92. See N.Y. Safe Harbor Act, *supra* note 89. Section II of the bill added a new article 10 D to the Social Services Law entitled "Services for Victims of Human Trafficking." Section

are also expressly exempt from prosecution as accomplices to labor trafficking or sex crimes under the terms of the bill.<sup>93</sup> There was virtually no floor debate on the New York law and passage was unanimous. Media coverage contemporaneous with the debate and passage of the New York legislation focused on the victim-protective nature of the legislation, including the potential benefits that the bill would have for noncitizens subjected to trafficking practices.<sup>94</sup> Although coverage was uneven, many accounts focused on the diverse populations victimized by traffickers, and noted the harms of labor trafficking as well as sex trafficking.<sup>95</sup>

## 5. Washington

Washington was the first state to pass a human trafficking law, enacting its legislation in 2003. The state legislature initially modeled its laws on the TVPA and on the recommendations of the Washington Task Force on Trafficking.<sup>96</sup> Washington's H.B. 1175 created the crime of trafficking in persons, which covers forced labor and involuntary servitude, and contains no distinction between sex and labor trafficking. The original proposal would have punished these crimes on par with second-degree murder, which could include a possible sentence of death or life in prison, but the legislature revised the punishment downward prior to passage.

The legislature has revised the state's trafficking legislation several times in the intervening years. Most significantly, a new offense of commercial sexual abuse of a minor was created by the state legislature in 2007.<sup>97</sup>

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483 aa defines pre-certified trafficking victims and Section 483 bb authorized their assistance through the Office of Temporary and Disability Assistance.

93. N.Y. PENAL CODE §§ 135.36, 230.36 (McKinney 2016).

94. See, e.g., Daniela Gerson, *NYPD, Albany Focus on Human Trafficking Issue*, NEW YORK SUN, Feb. 3, 2006, at 4 (noting past trafficking cases involving Peruvian and Mexican victims, and quoting several immigrants' rights organizations as supporters of the legislation).

95. See, e.g., Julia C. Mead, *A Slow War on Trafficking*, N.Y. TIMES, May 28, 2006, at 14LI (extensively quoting Florrie Burke of Safe Horizons, noting "that although massage-parlor brothels full of young Asian women stand out as obvious targets on Long Island, she has encouraged the police to also investigate restaurants, farms, sweatshops, topless bars and domestic-service agencies. 'Targeting one population is not a great idea,' she said. 'We have to look at the work situations, rather than an ethnic population.'").

96. Judith Spitzer, *Trailblazing State Law on Human-Traffic Bogs Down*, WOMEN'S ENEWS, Oct. 6, 2011, <http://womensenews.org/2011/10/trailblazing-state-law-human-traffic-bogs-down/#>.

97. S.B. 5718, 2007 Reg. Sess. (Wash. 2007).

Although this was technically an offense created in 1999 (originally “patronizing a juvenile prostitute”), the 2007 version renamed the offense and shifted the focus slightly from merely punishing the individual who solicited and paid for sexual services to also obtaining restitution for the juvenile victim.

From 2011 to 2013, at the urging of nonprofit organizations and law enforcement groups, including Shared Hope International and the Washington Association of Prosecuting Attorneys,<sup>98</sup> the law was further revised. Nonprofit groups argued that legislative changes were needed to better protect minors from sex trafficking. Strikingly, law enforcement groups and the legislature instead viewed the revisions as an opportunity to address the potential trafficking issues purportedly arising from Washington’s shared border with Canada.<sup>99</sup>

### C. Assessing Patterns of Prosecution Across States

Analysis of the published state prosecutions for trafficking requires the important caveat that the publically available data on these prosecutions is somewhat limited. First, there simply are not that many. In 2011, for example, the U.S. federal government prosecuted 151 trafficking cases, and the number of state prosecutions was in the “dozens.”<sup>100</sup> Indeed, until near the very end of the period under study in this article, the number of prosecutions in most states remained quite low. There has been a significant uptick in prosecutions and related criminal law activity after 2011, particularly in California and New York.<sup>101</sup> It is possible that if antitrafficking

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98. See HOUSE BILL REPORT, S.B. 5669, 2013 Reg. Sess., at 5 (Wash. 2013); SHARED HOPE INTERNATIONAL, DOMESTIC MINOR SEX TRAFFICKING: CHILD SEX SLAVERY IN WASHINGTON (2011), available at <http://sharedhope.org/wp-content/uploads/2012/09/WashingtonRA2.pdf>.

99. *Id.*

100. Heinrich & Sreeharsha, *supra* note 31.

101. The only other available comprehensive study of state trafficking prosecutions covers only the period of 2003–2012, and ends before this recent uptick. Vanessa Bouche, Amy Farrell, & Dana Wittmer, Identifying Effective Counter-Trafficking Programs and Practices in the U.S.: Legislative, Legal and Public Opinion Strategies that Work, November 2015 (unpublished, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/249670.pdf>). That study also combines both federal and state prosecutions and arrests, whereas this study seeks to isolate the state-level interpretations of trafficking laws. The state-level arrest data provided by that study appear consistent with the data herein. See *id.* at 7–8.

initiatives continue to garner national and local media attention and federal funding, other states will follow suit.

Second, some (perhaps many) of the cases involving potential trafficking charges are not published in electronic databases. In some cases, prosecutors may threaten to bring trafficking charges, but ultimately drop that threatened charge in response to a defendant's agreement to plead to a lesser offense.<sup>102</sup> In other cases, a defendant may plead guilty to a trafficking charge, but there is no appeal of the conviction and therefore no record of the case in some states' available online databases. And in some jurisdictions, critical data on county-level prosecutions are simply not recorded in a form readily available to the public for free.

To provide a better sense of the scope of missing data, and to help provide a more complete picture of how the problem of trafficking is locally conceptualized, the synopsis and analysis of state decisions that follows is supplemented by information available in the major newspapers in the jurisdictions studied here. By and large, the media accounts corroborate the story told by the court databases: in most states, although the number of actual prosecutions is higher than those recorded in available public databases, there simply are not that many prosecutions. In California, however, press accounts make clear that the twenty-three cases published electronically represent only a sliver of the cases in California in which human trafficking victims have been identified. From 2010 to 2012, California's nine regional human trafficking task forces "identified 1,277 victims, initiated 2,552 investigations, and arrested 1,798 individuals."<sup>103</sup> Although less than half of those individuals were ultimately charged with trafficking and certainly many fewer were actually convicted, this still demonstrates a gap between trafficking charges and available published information on them.<sup>104</sup> A similar trend appears to be emerging in New York (see Table 1).

Media accounts also reveal that between 2006 and 2013, the Alameda County District Attorney's Office prosecuted 325 defendants on human

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102. *Id.* at 24–25 (discussing the extensive use of this strategy). This strategy is readily apparent in the published cases analyzed herein.

103. *Human Trafficking: State Vows Crackdown on Abusers*, DAILY NEWS OF L.A. (Valley edition), Nov. 17, 2012, at A3.

104. To help fill this information gap, a subsequent project will focus on county-level data in California.

trafficking charges.<sup>105</sup> That number accounted for half of the state’s total trafficking prosecutions,<sup>106</sup> but many other counties mirrored Alameda County in accelerating their prosecutions during this period.<sup>107</sup> Interestingly, throughout the 2006–2015 period, literally hundreds of stories in newspapers in California’s major media markets detailed the grave threat of human trafficking—both sex and labor trafficking—but not a single story mentioned an actual labor trafficking prosecution by California prosecutors.<sup>108</sup>

Third, this analysis does not include the work of the special trafficking courts established in states like California and New York. These trafficking courts are charged with reviewing and, where appropriate, vacating the commercial sex crime sentences of individuals in cases where the crime is shown to have been induced by a trafficker, and allowing trafficking victims to access state services as an alternative to criminal sanctions. Various counties in California and New York have established such courts.<sup>109</sup>

105. Alex Emslie, *Bay Area in Forefront of Campaign Against Human Trafficking*, KQED, Jan. 14, 2014, <https://www.kqed.org/news/2014/01/12/bay-area-leads-campaign-against-human-trafficking/>.

106. *Id.* The story also notes that over 900 charges of pimping, pandering, and procuring a minor for lewd purposes were also prosecuted in this time frame.

107. See, e.g., Denise Salazar, *Human Trafficking Bill Gains Traction*, ORANGE COUNTY REG., April 11, 2014, at A (“[T]he number of cases prosecuted under state sex-trafficking statutes have more than tripled over the past four years in San Diego County. . . . [In 2013], the San Diego District Attorney’s Office filed human trafficking related charges against 43 defendants in cases involving some 50 victims, nine of whom were younger than 18.”); see also Ed Royce, *The Fight Against Human Trafficking*, ORANGE COUNTY REG., Dec. 14, 2014, at H (noting that the Orange County Human Trafficking Task Force has served over 225 victims of trafficking in 2013 alone”). The first article, like most other articles on these developments, references only sex trafficking.

108. There were several mentions of labor trafficking prosecutions, but all involved federal agencies. See, e.g., Robert Salonga, *Walnut Creek Woman Found Guilty in Servitude Case*, MERCURY NEWS (San Jose), Oct. 9, 2009, [http://www.mercurynews.com/crime-courts/ci\\_13525967](http://www.mercurynews.com/crime-courts/ci_13525967) (discussing the federal prosecution of defendant Mabelle de la Rosa Dann for a domestic servitude case involving a Peruvian nanny); *EEOC Addressing Major Labor Trafficking Incident*, INSIDE COUNSEL, May 2011, at 5 (reporting a suit brought by the federal Equal Employment Opportunity Commission against a “California labor contractor and six farming businesses” for labor trafficking.).

109. See, e.g., Patricia Leigh Brown, *An All-Hands Approach Aids Girls Most at Risk*, N.Y. TIMES, Jan. 29, 2014, at A11 (discussing California Courts); Editorial, *A Bold Plan to Aid Trafficking Victims*, N.Y. TIMES, Sept. 26, 2013 (discussing the eight trafficking courts opened throughout the state to supplement three pilot courts that were operating in

**Table 1. Published state trafficking prosecutions by type of trafficking through 2015**

State	Arizona	California	Georgia	Illinois
Total published cases	1 [a]	23	33 cases; 54 defendants	18 cases
Sex trafficking	1	23	31	18
Labor trafficking	0	0	2 cases: 1 case with 3 defendants [d]; 1 case with 1 defendant [e]	0
Total prosecutions reported by media	36 [g]	Over 600 [h]	29 total prosecutions as of 2012 [i]	20 [j]

[a] *State v. Clarke*, 2010 WL 4978453 (Ariz. App. Ct. 2010) (not reported).

[b] Recent increases in local law enforcement resources dedicated to trafficking in the Seattle area are likely to result in increased prosecutions. See, e.g., Sara Jean Green, *Large Prostitution Ring, Bellevue Brothels Shut Down*, SEATTLE TIMES, Jan. 7, 2016, <http://www.seattletimes.com/seattle-news/crime/online-site-where-men-rated-prostitutes-is-shut-down-charges-to-be-filed/> (reporting on a bust of a large brothel bust involving multiple criminal defendants charged with sex trafficking of South Korean women).

[c] All cases involve charges under General Laws ch. 265, § 50 (sexual servitude), and/or General Laws ch. 272, § 7 (deriving support from prostitution).

[d] *State v. Ali et al.*, No. 09-B-02232-10 (Ga. Sup. Ct. arraigned Apr. 17, 2009). In *Ali*, defendants Shifiquit Muhammad Ali, Farrukh Iqbal Khan, and Victor Varughese were charged with bringing in immigrant women from India to work as belly dancers at a nightclub under conditions of virtual enslavement. See also Heath Hamacher, *Probable Cause Found in Human Trafficking Case*, GWINNETT DAILY POST, Jan. 21, 2009. Press accounts in 2010 discuss the state prosecution of defendant Ming Zheng for the labor trafficking of a Honduran man. See, e.g., Jeremy Redmon, *Norcross Man Tries to Sell Immigrant*, ATLANTA JOURNAL-CONSTITUTION, Dec. 1, 2010.

[e] *State v. Degraffenreid*, No. 12-CR-3943 (Ga. Super. Ct. sentenced Feb. 26, 2013).

[f] *Ramos v. State*, No. 13-06-00646-CR, 2009 WL 3210924 (Tex. Crim. App. Oct. 8, 2009) (prosecution of Latina for labor trafficking of two Mexican women).

[g] J.J. Hensley, *Human trafficking is targeted in Arizona: Problem is growing*, THE ARIZONA REPUBLIC (February 20, 2011), <http://www.azcentral.com/news/articles/2011/02/20/20110220human-trafficking-awareness.html> (stating, without providing additional detail, that 36 cases were brought under Arizona's antitrafficking law before 2011). Newspaper stories in the major Arizona media markets during that period similarly offer no evidence of labor trafficking cases, and every reported high-profile sex trafficking case appears to have been brought by federal prosecutors, not state prosecutors. At the same time, the state prosecuted hundreds of migrants for smuggling themselves (effectively an illegal presence prosecution) under Arizona's antimuggling laws. See Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before S.B. 1070*, 58 UCLA L. REV. 1749 (2011).

[h] See discussion at notes 105–108, *supra* (discussing prosecutions in California counties).

[i] Press accounts provide evidence that there have been more prosecutions for sex trafficking in Georgia than are reflected in the published cases; e.g., “In the last two years, our office has brought cases against 30 traffickers involving 36 victims, including children as young as 12” (Sally Quillian Yates, *Slavery in Shadows Hard to Pin Down*, ATLANTA JOURNAL-CONSTITUTION, Jan. 18, 2013, at A16). Moreover, hundreds of individuals are being identified by Georgia law enforcement and social service agencies as trafficking victims. A study of Georgia law enforcement attitudes found that most believe child prostitutes should be prosecuted and noted, “local GA law enforcement reported 190 cases in 2012,” and “40 social service agencies in 2012 saw 466 victims of sex trafficking and 52 victims of labor trafficking” (Rhonda Cook, *Georgia Crime Report*, ATLANTA JOURNAL-CONSTITUTION, May 5, 2014).

**Table 1. (Continued)**

<i>Massachusetts</i>	<i>Missouri</i>	<i>New York</i>	<i>Texas</i>	<i>Washington</i>
22 cases; 29 defendants	20 cases charged; 16 charges dropped	3	26	23 [b]
22 cases; 29 defendants [c]	20 cases charged; 16 cases dropped	1	25	23
0	0	2 cases; 5 defendants (Does not include Trafficking Court.)	1 [f]	0
Over 13 [k]	No count [l]	No count; media accounts suggest hundreds [m]	No count [n]	No count [o]

[b] Scattered news accounts in the period from 2011 through 2014 describe twenty different defendants in cases involving crimes identified as trafficking, although it is not clear that all were actually charged with trafficking. Indeed, in some cases described in media accounts (but not included in this total), individuals apprehended during antitrafficking raids were charged with lesser offenses, including at least four women charged with misdemeanor prostitution. See, e.g., Griffin, *supra* note 81; and Robert Sanchez, *FBI Sweep Reaches the Suburbs*, CHICAGO DAILY HERALD, July 30, 2013, at A1.

[k] Jennifer B. McKim, *Getting Tough Just Talk: Focusing on Johns Struggles to Gain Traction*, TELEGRAM & GAZETTE, Nov. 17, 2013, at A1 (reporting that since the 2011 enactment of the state’s antitrafficking law, the state attorney general reported that her office had filed trafficking charges against 13 defendants). Media reports in the period following this report but within the period of study cover several additional indictments. The convictions of Rafael Henriquez and Ramona Hernandez, which are the first reported state convictions, occurred in February 2014. All coverage is of cases involving nonwhite defendants.

[l] Missouri media coverage focuses almost entirely on federal prosecution of Black and Latino male defendants. There are no reports in major media outlets in this period about the state prosecutions, which are predominantly of white males.

[m] By March 2013, the Brooklyn District Attorney had filed sex trafficking charges against 53 defendants, resulting in 24 guilty pleas and four dismissals with 25 cases still pending. Oren Yaniv, *Evil “Daddy”: Teen Sex Slaves Spellbinding Court Tale of Pimp Horror*, N.Y. DAILY NEWS, March 4, 2013, at A15. Media accounts report scattered prosecutions in other counties, too. Moreover, more than 2,000 individuals were processed by New York’s Human Trafficking Intervention Courts (HTICs) between late 2013 and late 2014. *Want to Know the Truth About Human Trafficking Courts? Ask a Sex Worker*, LEGAL MONITOR WORLDWIDE, October 27, 2014. These cases, by definition, involving individuals charged with crimes who might be eligible for diversion and services if they are trafficking victims. It does not suggest, however, that a comparable number of individuals were prosecuted for trafficking. Critics of these courts note that the Black women diverted to these courts disproportionately face heavier commercial sex charges, and argue that these women are overrepresented in the first place because of discriminatory policing practices. (“Shira Hassan, a harm reduction and transformative justice specialist in Chicago, said that anti-trafficking advocates often push for laws and special courts that reduce the penalties prostitution defendants face, in the name of decriminalization. These efforts are not about decriminalization, she said. They are about changing the process by which someone is criminalized.” *Id.*)

[n] Media sources from across the state during this period report a small handful of state prosecutions. All reports of state prosecutions cover cases involving Black or Latino male defendants. Some reports covering federal cases also involve women defendants, always Latina. No story covers a case involving a white male defendant. Much of the coverage pertaining to human trafficking links it to the issue of border control and/or Mexican cartels. See, e.g., Ulloa, *supra* note 63.

[o] Media accounts suggest the existence of a handful of prosecutions. One case from mid-2012 involving four nonwhite defendants is identified as the first trafficking case filed in Spokane County, Washington. Meghann M. Cuniff, *Human Trafficking Case Opens*, SPOKANE SPOKESMAN REVIEW, May 25, 2012, at A5.

These courts provide services to both citizen and noncitizen victims of sex trafficking, although at least until recently, most identified victims were domestic victims.<sup>110</sup> Noncitizen victims are often vulnerable to deportation on criminal grounds on the basis of criminal convictions when vacatur is not immediate. Furthermore, although the victim assistance and vacatur of criminal convictions are better alternatives than living with criminal convictions, trafficking courts are also administered in ways that involve significant social control by the state over victims and place pressure on victims to collaborate in prosecution efforts in exchange for their own classifications as crime victims rather than criminals.<sup>111</sup> Unlike safe harbor

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Queens, Manhattan, and Nassau County.). Of the eight published New York trafficking court cases, only one of the motions for vacatur was denied. *In re Bobby P.*, 907 N.Y.S.2d 540 (Fam. Ct. 2010) (denying PINS petition because the judge did not think the individual—a 16-year-old mother with a history of involvement in commercial sex—demonstrated committed to participating in the program). In one case involving a Brazilian woman, the judge vacated 86 prior convictions for one defendant. *People v. Gonzalez*, 927 N.Y.S.2d 567 (Crim. Ct. 2011).

110. A 2012 state Attorney General's Office report found that 72 percent of identified California trafficking victims were U.S. citizens. But some cases of sex trafficking prosecuted by state officials certainly involved noncitizen victims. *See, e.g.*, Robert Salonga, *Human Trafficking Task Force Yields Three Crucial Cases Since Inception*, MERCURY NEWS (San Jose), Oct. 1, 2014, [http://www.mercurynews.com/crime-courts/ci\\_26643892/santa-clara-co-human-trafficking-task-force-yields](http://www.mercurynews.com/crime-courts/ci_26643892/santa-clara-co-human-trafficking-task-force-yields) (noting that of the three cases, one involved "several women being trafficking from multiple Southeastern Asian countries, all for sexual exploitation"); Chris Metinko, *Police Arrest Eight in Asian Prostitution Ring Bust Covering Three Counties*, EAST BAY TIMES, Jan. 21, 2011, [http://www.eastbaytimes.com/ci\\_17159868](http://www.eastbaytimes.com/ci_17159868) (reporting that eight were arrested and nine women were "detained" in a law enforcement sweep of brothels in ten locations in which "scores of Asian women were exploited"). The defendants in that case were identified as Di Sun, Nu Trinh, Ping Fen Wu, Mei Chien, Larry Cordeiro, Li Hun Chio, Wen Yan Gold, Jennifer Mitchell Keahilihau, Curt Mieczkowski, and Kuanshun Chen. *Id.*

111. Gruber, *supra* note 110. This is a common criticism of antitrafficking victim assistance offered through the criminal justice system. *See, e.g.*, Synnøve Økland Jahnsen & May-Len Skilbrei, *From Palermo to the Streets of Oslo: Pros and Cons of the Trafficking Framework*, 4 ANTI-TRAFFICKING REVIEW 156 (2015) ("[I]t can be considered a positive development that the Trafficking Protocol forced the Norwegian government to take exploitation in cross-border prostitution more seriously than before. . . . At the same time, the increased policing of prostitution has resulted in a new type of regime where migrants in prostitution are subjected to extensive forms of surveillance and control in the name of rescue and security. That new policies in practice may increase vulnerabilities to trafficking and other exploitative situations, rather than reduce them, is an issue that is increasingly taken up in discussions in Norway, and in particular as these debates relate to the Sex Purchase Act.").

laws that prohibit the prosecution of minors for commercial sex, these jurisdictions use back-end forms of relief or diversionary programs (in California, including in cases involving minors) that do not necessarily spare victims contact with the criminal justice system, and in fact can entwine them in those systems in problematic ways.<sup>112</sup>

With these caveats on the scope of the data in mind, a few important patterns are suggested by the available data on state prosecutions. First, as revealed in Table I, in none of these states have significant numbers of labor trafficking charges been filed by state officials, and the number of labor trafficking cases in all jurisdictions is dwarfed by the number of sex trafficking cases in those jurisdictions. Although both federal and state officials frequently comment on the importance of preventing labor trafficking, most media coverage of state antitrafficking efforts still remain focused almost exclusively on sex trafficking.<sup>113</sup>

Consistent with governing state legal regimes and practices, media outlets now commonly stress the fact that *sex* trafficking victims are not criminals, and that their involvement in the sex industry is a result of coercion rather than criminal intent. Victims are portrayed as in need of treatment and support rather than punishment. But this type of unified narrative has not emerged around labor trafficking, even in states like California, where labor trafficking is a stated priority of law enforcement and state officials. The widespread presence of an exploited unauthorized labor force may be complicating advocates' ability to shape that narrative insofar as extant conditions naturalize workplace exploitation and render it banal, particularly in the case of immigrant workers.

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112. Cheryl Nelson Butler, *Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281 (2015) (noting the harms of prosecution and advocating safe harbor laws); Janet C. Sully, *Precedent or Problem?: Alameda County's Diversion Problem for Youth Charged with Prostitution and the Case for a Policy of Immunity*, 55 WM. & MARY L. REV. 687 (2013) (advancing the same argument using examples from Alameda County). Even safe harbor states do create leeway for law enforcement to detain youth trafficking victims for investigative purposes. *Id.* at 696 (discussing the Illinois safe harbor provision).

113. This finding is consistent with the findings of other studies. One study completed in 2012 found that no state had engaged in a labor trafficking prosecution at that time. AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES (2012). The 2015 report by Bouche et al., places the overall prosecutions of labor trafficking at 2 percent of total trafficking prosecutions. See BOUCHE ET AL., PROGRAMS THAT WORK, *supra* note 101, at 24.

Second, although the citizenship of the defendants and alleged victims is seldom specified, based on narratives in the published cases and in media accounts, it appears that most state-level prosecutions have involved citizen perpetrators who target citizen victims. As Table 2 illustrates, individuals who belong to racial minority groups—and particularly Black men—have been prosecuted at rates higher than their presence in the general population. Indeed, in every state in this study except Missouri, Black men have been prosecuted disproportionately (and often severely disproportionately) to their presence in the general population. This may suggest that the enforcement of prohibitions on “trafficking,” like that of other vague criminal law provisions, has been shaped by pervasive racialized understandings of criminality generally, and of perpetrators of specific kinds of sex crimes more specifically.

Third, several of the states that have most significantly ramped up their antitrafficking prosecutions in recent years—including California, Illinois, Texas, and Washington—are increasingly deploying the very same narrative that resulted in the Trafficking Protocol’s status as supplemental to the Crime Convention. Specifically, state officials have begun to explain state trafficking crimes as a product of transnational gang activity, even as they prosecute crimes related to commercialized sex that appear almost entirely domestic in nature.<sup>114</sup> In this way, efforts to maximize trafficking prosecutions have become increasingly intertwined with antigang policing that is fueled by, and feeds, narratives of urban Black and Latino criminality, as well as immigrant criminality.<sup>115</sup> Given the highly racialized nature of antigang policing in the United States, state law enforcement officials’ increasing emphasis on the connection between human trafficking and the criminal activities of gangs and transnational drug cartels could result in practices that further exacerbate these disparities by increasing the focus on

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114. See, e.g., Doug Saunders, *Suspect Pleads Guilty to Human Trafficking of Inland Empire Girls*, THE SUN (San Bernadino), Jan. 15, 2014, <http://www.sbsun.com/general-news/20140115/suspect-pleads-guilty-to-human-trafficking-of-inland-empire-girls> (noting in a story involving a domestic trafficker that “[g]ang members and Mexican cartels have expanded from trafficking guns and drugs to trafficking humans, according to state Attorney General Kamala Harris”). Similar statements have been made by officials and captured in media accounts in Washington, Illinois, Arizona, and Texas, often in discussing cases where a transnational element is not apparent.

115. Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member,”* 11 U. CHICAGO L. FORUM 317 (2007).

**Table 2. Published state trafficking prosecutions by race of defendants**

State	Arizona	California	Georgia	Illinois	Massachusetts	Missouri	New York	Texas	Washington
API males [a]	0	1	0	0	0	1 charged and convicted	0	0	0
Black males	1	6	32	14	2	3	1	7	8 [b]
Latino males	0	0	0	0	0	1	0	2	0
Native American males	0	0	1	0	0	0	0	0	0
Noncitizen males			0 [c]				1 Indian [d]		
White males	0	0	4	1	4	11 charged; 3 convicted	0	7	0
Males, race not given	0	14	15		11			1	14
API females	0	0	0	0	1	0	0	1	0
Black females	0	1	2	1	3	0	0	3	1
Latina females	0	0	0	1	0	0	0	1	0
Native American females	0	0	0	0	0	0	0	0	0
Noncitizen females							1 Trinidadian [e] 2 Indian [f]		
White females	0	0	1	1	1	3	0	2	0
Females, race not given	0	1	0	0	0	1	0	0	0

[a] API indicates an individual of Asian or Pacific Island descent.

[b] Six of the cases were connected to a single prostitution ring being run by the West Seattle Side Mobb "youth gang." Levi Pulkkinen, *West Seattle Pimp Sentenced to 9 Years; Brother Could Face Decades in Prison*, SEATTLEPI.COM, Dec. 10, 2009, <http://www.seattlepi.com/local/article/West-Seattle-pimp-sentenced-to-9-years-brother-897735.php>.

[c] Press accounts in 2010 discuss the state prosecution of defendant Ming Zheng for the labor trafficking of a Honduran man, but it was not clear whether the defendant was ultimately prosecuted in state or federal court. Jeremy Redmon, *Norcross Man Tries to Sell Immigrant*, ATLANTA JOURNAL CONSTITUTION, Dec. 1, 2010.

[d] *People v. Jagota*, 8 N.Y.S.3d 593 (mem.) (App. Div. 2015) (three members of an Indian family charged in the labor trafficking of an Indian female).

[e] *People v. Khan*, 6 N.Y.S.3d 713 (App. Div. 2015) (charged with labor trafficking of another Trinidadian female).

[f] *Jagota*, see *supra* note [d] for details.

Black, Latino, and Asian “gangs,” as well as noncitizens more generally, as targets of prosecutions.

## CONCLUSIONS

Although state-level prosecutions for human trafficking crimes to date have targeted criminal activity that is largely domestic in nature, the attitudes of state legislatures toward noncitizens have played an important role in shaping legislative and law enforcement responses to trafficking within states. Most notably, restrictionist jurisdictions like Arizona, Georgia, and Texas have enacted antitrafficking legislation as an explicit form of migration control, and have deployed antitrafficking laws discursively to justify a broader set of immigration enforcement efforts. Noncitizen trafficking victims are impeded from seeking redress in these states by a web of anti-immigrant state laws that generate fear of law enforcement in migrant communities, even as narratives of their victimization has been used to justify increased funding and focus on antitrafficking initiatives.<sup>116</sup>

The latest rhetorical turn in subfederal antitrafficking enforcement highlights yet another interesting paradox concerning the role of non-citizens in shaping U.S. criminal justice responses to human trafficking. As noted at the beginning of this discussion, the international Trafficking Protocol was conceived as an international response to transnational

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116. Indeed, in Georgia, skeptical investigative journalistic accounts have highlighted the mismatch between the pervasive—and fund-generating—rhetoric around the extensive harms arising out of Atlanta’s status as “hotbed” or “epicenter” of trafficking, and the very limited data supporting the claims that large numbers of victims have received assistance. *See, e.g.*, Mariano Willoughby, *Faulty Figures Mask Trafficking Reality*, ATLANTA JOURNAL CONSTITUTION, DEC. 20, 2012 (“[T]his area is notorious as one of the nation’s worst human trafficking hubs. That reputation ignited a decade of efforts against what is described as modern-day slavery. . . . But an investigation by the Atlanta Journal Constitution found that the initiatives are based on facts and figures that, while preached as gospel and enshrined in legislation, are gross distortions. Even the widespread belief that Atlanta is one of the nation’s child exploitation capitals stands on shaky ground. In this information vacuum, government officials have created programs that promise to find and help victims, but to often don’t.”). In reviewing press accounts from around the country, it is striking how many different jurisdictions claim to be the hub or the primary cite of the national trafficking problem. *See, e.g.*, Griffin, *supra* note 81 (making such claims about Chicago).

crime. It has been both critiqued<sup>117</sup> and defended<sup>118</sup> for deploying criminal law mechanisms to advance what is nominally an international human rights concern. Now, subfederal law enforcement agents and prosecutors are expressly deploying *local* criminal laws—largely against domestic victims and (thus far) perpetrators—to combat harms that their own rhetoric increasingly blames on transnational criminal actors.

There is an emerging danger that in these local contexts, some of the distortions of the existing state criminal law systems, particularly with regard to their biases against minority groups and noncitizens, may be amplified by (or at least replicated in) antitrafficking efforts.<sup>119</sup> These tentative conclusions will require further study. In the meantime, states genuinely interested in reducing the harms of trafficking will need to be vigilant if they hope to ensure that their rhetorical and material commitments to combatting particular forms of trafficking do not undercut broader goals of protecting human rights, particularly those of vulnerable noncitizens and racial and ethnic minorities.

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117. See, e.g., Hathaway, *supra* note 19.

118. See, e.g., Gallagher, *supra* note 1.

119. Self-identified hubs of trafficking—places where federal resources are being deployed and where local prosecution efforts exceed the norm—are usually dense urban communities with higher percentages of minority and noncitizen residents—cities including Atlanta, El Paso, and Oakland.