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TENSIONS AND TRADE-OFFS: PROTECTING TRAFFICKING  
VICTIMS IN THE ERA OF IMMIGRATION ENFORCEMENT

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JENNIFER M. CHACÓN<sup>†</sup>

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INTRODUCTION

The restrictions on migration that have been imposed by individual countries—and, in recent years, particularly those imposed by wealthy nations—have contributed significantly to the contemporary problem of international trafficking.<sup>1</sup> Rising restrictions on migration

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<sup>†</sup> Professor of Law, U.C. Irvine School of Law; J.D., Yale Law School, 1998; A.B., Stanford University, 1994. The author wishes to thank Professor Tobias Wolff for his invitation to participate in this Symposium and Sarah Paoletti, J.J. Rosenbaum, and Jayashri Srikantiah for their helpful comments during and after our panel discussion. Thanks also to Dean Erwin Chemerinsky for his support of this research and to Ellen Augustiniak and Christina Tsou for their research assistance. Finally, thanks to Max and Jonathan for being such great sports and such fun travelling companions.

<sup>1</sup> See generally DOUGLAS S. MASSEY ET AL., *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM* 293 (1998) (noting that

over the past two decades have coincided with unprecedented freedom of movement for goods and capital. The physical movement of people and goods from one nation to another has never been easier. But while free trade agreements and technology have facilitated the flow of goods and money across borders, immigration restrictions have resulted in more rigid restrictions on the cross-border movement of people. Unsurprisingly, unauthorized migration ensues.<sup>2</sup> This includes both economically motivated migrations and migrations undertaken by individuals fleeing oppression and conflict in their home countries. Facing waves of refugees and job seekers with new modes of transportation, the West has moved to raise legal barriers to entry for desperate and vulnerable populations.<sup>3</sup>

These legal barriers are backed up by physical barriers to entry. In the United States, for example, the build up of border enforce-

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the restrictions imposed by developed countries have deleterious effects on “individual rights, civil liberties, and human dignity”); Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L.J. 207, 295 (2007) [hereinafter Bravo, *Exploring*] (analogizing the trade-offs between individual states’ border-protection measures and human trafficking harms to trade-offs made in furtherance of the institution of slavery); Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 TRANSNAT’L L. & CONTEMP. PROBS. 545, 547 (2009) [hereinafter Bravo, *Free Labor!*] (explaining that people are “more vulnerable to the predations of exploitative middlemen such as traffickers in human beings” because “borders are now more heavily policed and enforced”); James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 5 (2008) (“Indeed, the criminalization of smuggling may actually increase the risk of human trafficking by driving up the cost of facilitated transborder movement and leaving the poor with no choice but to mortgage their futures in order to pay for safe passage.”); Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 833-34 (2009) (observing that migration regimes reinforce discrimination and inequality and positing that truly open borders could alleviate these problems).

<sup>2</sup> Cf. Gallagher, *supra* note 1, at 833-34 (arguing that trafficking will decrease if the international labor-market mobility mirrors that of goods and services).

<sup>3</sup> See, e.g., BRIDGET ANDERSON, DOING THE DIRTY WORK? THE GLOBAL POLITICS OF DOMESTIC LABOUR 138 (2000) (cataloging the power structure under which migrant domestic workers operate); Itty Abraham & Willem van Schendel, *Introduction: The Making of Illicitness* (describing how these barriers reflect intrastate contradictions about what is illicit), in *ILLICIT FLOWS AND CRIMINAL THINGS: STATES, BORDERS, AND THE OTHER SIDE OF GLOBALIZATION* 1, 23-24 (Willem van Schendel & Itty Abraham eds., 2005); Bravo, *Free Labor!*, *supra* note 1, at 569-71 (discussing the “historical anomaly” of these increased border restrictions); Hathaway, *supra* note 1, at 26-27 (discussing the use of the Smuggling Protocol, an international treaty, to reinforce domestic migration controls); Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN’S L.J. 31, 36-38 (2002) (tracing the trafficking of dislocated workers to the forces of economic globalization); *Wide Angle: Dying to Leave* (PBS television broadcast Sept. 25, 2003), available at <http://www.pbs.org/wnet/wideangle/episodes/dying-to-leave/video-full-episode/1126> (discussing rising barriers to migration in developed nations).

ment began in earnest in the mid-1990s and has continued to the present day.<sup>4</sup> And in just a few short years, the federal criminal justice system has been converted into an important legal adjunct to the growing human and technological barriers along the border.<sup>5</sup> Beginning several years ago, the prosecutorial arm of the Department of Justice turned to the systematic prosecution of thousands of misdemeanor illegal entry and felony reentry cases along the southern border.<sup>6</sup> These prosecutions, which are conducted in a mere handful of federal districts, have had a huge impact on the shape of U.S. criminal justice. Immigration prosecutions make up over fifty percent of all federal criminal prosecutions, handily outstripping prosecutions for drug crimes, weapons possession, and white collar crime.<sup>7</sup>

As immigration restrictions and border enforcement have increased, the sophistication and violence of the organizations that promote the illicit movement of people across borders—whether in the form of smuggling or trafficking—have also grown.<sup>8</sup> In the U.S.

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<sup>4</sup> See, e.g., Peter Andreas, *The Transformation of Migrant Smuggling Across the U.S.-Mexican Border* (outlining the impact of the Immigration Reform and Control Act of 1986 and subsequent acts), in GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES 107, 112-16 (David Kyle & Rey Koslowsky eds., 2001); Wayne A. Cornelius, *Controlling 'Unwanted' Immigration: Lessons From the United States, 1993-2004*, 31 J. ETHNIC & MIGRATION STUD. 775, 776 (2005) (describing the U.S. immigration-control strategy as launched by President Clinton and continued through the presidency of George W. Bush); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121, 127-28 (2001) (outlining Operation Gatekeeper's emphasis on deterrence). In debates over immigration reform, the only changes that Congress has been able to agree upon and enact have been measures increasing physical border-defense mechanisms. See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1829-30 (2007) (discussing failed immigration reform bills and the passage of a law strengthening the border fence).

<sup>5</sup> See Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135-36 (2009), <http://www.columbialawreview.org/articles/managing-migration-through-crime> (discussing the increasing use of criminal prosecutions as a tool for managing migration).

<sup>6</sup> *Id.* at 139-40.

<sup>7</sup> John Schwartz, *Immigration Enforcement Fuels Spike in U.S. Cases*, N.Y. TIMES, Dec. 22, 2009, at A16. Since 2004, immigration prosecutions have topped the list of federal criminal prosecutions, outstripping federal drug and weapons prosecutions, and dwarfing many other forms of federal criminal prosecutions. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION ENFORCEMENT: NEW FINDINGS (2005), <http://trac.syr.edu/tracins/latest/131> (“[I]mmigration matters now represent the single largest group of all federal prosecutions, about one third (32%) of the total. By comparison, narcotics and drugs, for many years the government’s dominant enforcement interest, dropped to about a quarter of the total (27%) and weapons matters to slightly less than one out of ten (9%).”).

<sup>8</sup> See GLOBAL COMM’N ON INT’L MIGRATION, MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION 33 (2005), available at <http://www.gcim.org/>

context, the recent rise in border enforcement has not only fueled violence along the southern border but also has made the northward journey much more difficult and expensive.<sup>9</sup> As criminal networks replace mom-and-pop smuggling operations, migrants who rely on the services of these networks are vulnerable to debt bondage, kidnapping, and exploitation. In other words, the humans that comprise the cargo transported by professionalized networks of smugglers are increasingly vulnerable to exploitation.<sup>10</sup> For some migrants, what may begin as a contractual agreement to be smuggled converts into a trafficking arrangement characterized by coercion during the course of the journey.<sup>11</sup>

Moreover, U.S. immigration law and policy unintentionally helps traffickers assert control over victims once those victims are in the United States. Unauthorized peoples are more vulnerable to threats because they know that efforts to seek legal recourse can result in protracted immigration detention, criminal prosecution, and, of course, removal. The legal limbo of unauthorized migrants has left many migrant laborers reluctant to report crimes<sup>12</sup> and labor violations.<sup>13</sup>

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attachements/gcim-complete-report-2005.pdf (cautioning about these potentially detrimental effect of efforts to prevent irregular migration on the welfare of migrants); Andreas, *supra* note 4, at 112-16 (linking the boom in human-smuggling services to tighter border policing); Maggy Lee, *Human Trade and the Criminalization of Irregular Migration*, 33 INT'L J. SOC. L. 1, 1 (2005) (describing the range of criminal groups involved in trafficking); *cf.* Gallagher, *supra* note 1, at 833-34 ("If international labor migration were as free as the trade in goods and services, then there would be no need to develop legal regimes to combat smuggling . . . . Unless and until a radical shift occurs in the structure and orientation of current migration regimes, there will be a market distortion; more people prepared (or forced) to move than safe and legal opportunities are available. Traffickers and smugglers are a result of this anomaly. Their existence and their future are tied up with its continuity.").

<sup>9</sup> See, e.g., Andreas, *supra* note 4, at 112-16 (detailing the effects of the expansion of border controls along the southern U.S. border); Hing, *supra* note 4, at 135 (arguing that border controls redirect the flow of illegal immigration and extract a higher human toll).

<sup>10</sup> See Andreas, *supra* note 4, at 116-20 (arguing that smugglers now apply more dangerous tactics to avoid increased penalties); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3009-10 (2006) (describing how border militarization drove illegal immigrants to high-priced smugglers); Cornelius, *supra* note 4, at 779 (positing that border controls force migrants to use paths that have more dangerous natural hazards); Lee, *supra* note 8, at 1 (describing the risks inherent in trading people as "commodities").

<sup>11</sup> See Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 48-50 (2009) (providing examples of "hypothetical migrants" to illustrate the sometimes fine line between trafficking and contractual agreements).

<sup>12</sup> See, e.g., Chacón, *supra* note 4, at 1886 ("[M]any non-citizens are reluctant to report crime because of their own fear of removal."); Orde F. Kittrie, *Federalism, Depor-*

The Trafficking Victims Protection Act of 2000 (TVPA)<sup>14</sup> and its successive reauthorizations, including the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003),<sup>15</sup> the Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA 2005),<sup>16</sup> and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008),<sup>17</sup> were designed to remedy some of the forces generated by U.S. immigration policy that have the effect of promoting trafficking in persons. In particular, these laws not only targeted traffickers for unique punishment (over and above that which would apply to smugglers) but also created a legal space for unauthorized migrant victims to come forward to report and seek protection from trafficking.<sup>18</sup> Some of the relevant legal mechanisms included the T visas that allow victims of trafficking to normalize their

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*tation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1455-56 (2006) (discussing sanctuary policies as a means of encouraging unauthorized migrants to report crime); Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 67-68 (2003) (finding extremely low reporting rates for rape victims without lawful immigration status); Robert C. Davis & Edna Erez, *Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System*, NAT'L INST. JUST.: RES. IN BRIEF, May 1998, at 1, 4-5, available at <http://www.ncjrs.gov/pdffiles/167571.pdf> (discussing the unique hardships that discourage immigrants from reporting crimes and analyzing data related to who does and who does not report crimes).

<sup>13</sup> See Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2183 (1994) (explaining how the risk of deportation deters immigrants from reporting labor and employment violations); Dina Francesca Haynes, *Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221, 257 (2004) ("A lack of viable and legal migration options leads people into trafficking; fear of deportation keeps them there."); Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 914-35 (2008) (discussing the effect of the U visa on reporting of labor and employment violations); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 669 (2003) (noting that many undocumented workers are reluctant "to report their harsh working conditions for fear they will attract the attention of immigration authorities").

<sup>14</sup> Pub. L. No. 106-386, §§ 101-113, 114 Stat. 1466, 1466-91 (codified as amended at 22 U.S.C. §§ 7101-7110 (2006)).

<sup>15</sup> Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended in scattered sections of 8, 18 & 22 U.S.C.).

<sup>16</sup> Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified as amended in scattered sections of 18, 22 & 42 U.S.C.).

<sup>17</sup> Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, 22 & 42 U.S.C.).

<sup>18</sup> See, e.g., Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 62 (2001) (describing the Act's three-tier approach targeting prevention, protection, and prosecution); Susan Tiefenbrun, *The Cultural, Political, and Legal Climate Behind the Fight to Stop Trafficking in Women: William J. Clinton's Legacy to Women's Rights*, 12 CARDOZO J.L. & GENDER 855, 876-77 (2006) (same).

immigration status, at least temporarily; resources from the Department of Health and Human Services (HHS) that provide trafficking victims with a means of support and access to necessary services; and a clearly communicated policy of nonprosecution for trafficking victims.<sup>19</sup> The reauthorizations of the TVPA also have added a private right of action for trafficking victims against their traffickers and added special protections for child victims.<sup>20</sup>

The TVPA has made progress in ensuring the protection of trafficking victims and the prosecution of traffickers in the United States.<sup>21</sup> Since the original TVPA was enacted in 2000, over two thousand individuals—both victims of trafficking and qualifying family members—have gained access to T visas.<sup>22</sup> This not only allows them to normalize their legal status in the United States but also provides them with a range of services from HHS that are designed to provide them with a financial safety net and a source of treatment for the physical and psychological injuries that they have suffered as a result of their trafficking.<sup>23</sup> Moreover, the U.S. government has successfully prosecuted over three hundred individuals for their participation in various trafficking schemes.<sup>24</sup>

Unfortunately, the humanitarian aims of the TVPA are often hindered because the goal of protecting exploited migrants frequently runs squarely into the competing goal of enforcing immigration laws.<sup>25</sup>

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<sup>19</sup> For a discussion of these features of the TVPA, and critiques thereof, see, for example, 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, 365-73 (2007), and Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 179-84 (2007).

<sup>20</sup> The private right of action was added in the 2003 TVPRA. For additional discussion of the private right of action, see note 58 and accompanying text. For a discussion of the additional protections for migrant children, see note 68 and accompanying text.

<sup>21</sup> For a relatively optimistic assessment of its effects, see, for example, Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249, 278-79 (2006-2007).

<sup>22</sup> 2009 ATT'Y GEN. ANN. REP. TO CONGRESS & ASSESSMENT OF U.S. GOV'T ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2008, at 35, available at <http://www.justice.gov/ag/annualreports/tr2008/agreporhumantrafficking2008.pdf> [hereinafter ATT'Y GEN. 2008 TRAFFICKING REPORT].

<sup>23</sup> For a discussion of benefits provided by HHS to trafficking victims, see *id.* at 9-23.

<sup>24</sup> See *id.* at 36 (providing data regarding the number of investigations undertaken by the FBI's Civil Rights Unit pertaining to human trafficking).

<sup>25</sup> See, e.g., Chacón, *supra* note 10, at 3022-23 (arguing that the TVPA's "unwillingness to extend protections to 'illegal workers' absent a showing of their 'innocence' embeds into the TVPA the same immigration and labor law policies that have created a

The line between voluntary migrants who participate in smuggling schemes and unwilling trafficking victims—a line that is often murky at best<sup>26</sup>—has been vigilantly policed.<sup>27</sup> The ability of public officials to use the tools of the TVPA to assist trafficking victims is thereby limited by the more powerful prerogatives of immigration enforcement.<sup>28</sup>

This is not to suggest that the TVPA has failed. U.S. antitrafficking efforts, like the international efforts to protect trafficking victims, have been important in protecting a small number of victims, punishing a small number of traffickers, and, perhaps most importantly, raising awareness about the nature and scope of the international trafficking problem. These advances are worthy of recognition. Nevertheless, it is equally important to acknowledge that antitrafficking efforts in the United States and elsewhere have been heavily constrained by the politics and policies of rigid immigration enforcement. In the end, there is no way to eliminate the scourge of trafficking on the international level as long as cross-border movement is subject to the high degree of regulation and criminalization that characterizes the contemporary global order.

More troublingly, some efforts to address the problem of trafficking within the framework of heightened border restrictions have the perhaps unintended effect of reinforcing migrants' vulnerability to exploitation. This Article seeks to expose some of the tensions and trade-offs between immigration policy choices and antitrafficking efforts. Part I of this Article focuses on the ways in which antitrafficking advocacy and policies can actually fuel the discourse that drives restrictionist immigration policies. Discussions regarding trafficking—including media coverage of trafficking, law enforcement antitrafficking-training efforts, and official statements on trafficking—have

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haven for trafficking and migrant exploitation"). See generally Haynes, *supra* note 19; Srikantiah, *supra* note 19.

<sup>26</sup> See, e.g., BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, TRAFFICKING—A DEMAND LED PROBLEM?: A MULTI-COUNTRY PILOT STUDY 18 (2002), available at <http://www.unodc.org/pdf/brazil/trafficking-a%20demand%20led%20problem.pdf> (discussing how the lack of distinction leads to research challenges); Bravo, *Free Labor!*, *supra* note 1, at 554-55 (describing a "flawed" distinction between trafficking and smuggling); Srikantiah, *supra* note 19, at 191-95 ("[S]muggling and trafficking are hard to distinguish from one another.").

<sup>27</sup> See CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW 89-91 (2008) (discussing efforts to develop a bright-line distinction between smuggling and trafficking); Chacón, *supra* note 10, at 3027 (noting that smuggled individuals "are unlikely to receive the protections of the TVPA").

<sup>28</sup> See Chacón, *supra* note 10, at 3027 (discussing how immigration enforcement and strict law enforcement standards are prioritized to the detriment of trafficking victims).

played into and compounded the myth of migrant criminality. Rather than increasing the focus on the ways in which immigration enforcement policies can foster exploitation, discussions about trafficking have tended to focus on particular bad actors. And the “bad actors” that are scrutinized are neither the middle-class beneficiaries of labor exploitation nor the customers who purchase services in the sex trade but the migrants who service the markets that these other actors create.

While it is certainly desirable to punish traffickers, ignoring the complicity of the vast array of people who generate the markets that traffickers service results in a misleading view of the trafficking problem. In popular discourse concerning the trafficking of migrants, the traffickers—almost always identified as noncitizen men or men of color, but occasionally including noncitizen women—bear sole responsibility for the human misery of trafficking. Framing the trafficking problem in this way fits comfortably within the larger narrative that has been constructed around unauthorized migration—a narrative in which migrant laborers are presented as criminal interlopers, but their criminality is entirely detached from the conduct of the consumers of their labor.

Part II of this Article explores how growing attention to the trafficking issue (in the United States and internationally) has occurred alongside, and has served as an additional justification for, the increasing reliance on the criminal justice system to manage migration. Section II.A explores the extent to which references to trafficking have been used to justify, among other things, greater law enforcement presence along the U.S.-Mexico border, greater numbers of prosecutors in border districts, and the rapid acceleration of immigration-related prosecutions. This has been the case even though very few of the resulting interdictions and prosecutions ultimately result directly in the protection of trafficking victims and even though the increased policing of the border and criminalization of migration can strengthen the hand of traffickers. Section II.B of this Article explores the development of state antitrafficking statutes and analyzes the extent to which these efforts can be understood as part of the larger trend of states and localities attempting to assert greater legal authority to participate in immigration enforcement.

By situating the issue of U.S. antitrafficking policies within the broader framework of U.S. immigration enforcement policies, this Article seeks to highlight some of the inherent tensions that emerge when nations embrace the goal of protecting trafficking victims while enforcing a highly restrictive immigration policy. This is not to suggest



that antitrafficking efforts are hopeless or undesirable in the present world order. To the contrary, it is clearly a positive development that certain victims are obtaining assistance and redress and that certain perpetrators are being fittingly punished. However, by highlighting the tension between current restrictionist approaches to immigration and antitrafficking efforts, this Article serves to caution those who support more aggressive antitrafficking efforts to be sensitive to the ways in which such efforts can be (and have been) used to bolster immigration enforcement policies that can ultimately fuel the exploitation lying at the heart of the global trafficking phenomenon.

#### I. FRAMING ANTITRAFFICKING POLICY WITHIN THE DISCOURSE OF MIGRANT CRIMINALITY

International human trafficking is certainly not a new problem. This phenomenon has existed throughout history, and over the past century, the international community has addressed various aspects of the trafficking problem.<sup>29</sup> There is no doubt that it took the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “Trafficking Protocol” or “Protocol”),<sup>30</sup> however, to push the issue of international trafficking to the forefront of international legal concerns. It was only after the enactment of the Trafficking Protocol that powerful nations, including the United States, began to address the problem of international trafficking in their own legislation and international foreign policy.<sup>31</sup> The Protocol, and the domestic legislation it has engendered, have moved the antitrafficking agenda firmly into the sphere of criminal law enforcement. Section I.A discusses the positive and negative practical effects of framing the antitrafficking agenda in terms of the criminal law. Section I.B explores the extent to which this new framing has fueled a

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<sup>29</sup> See, e.g., Convention on the Rights of the Child arts. 32-36, Nov. 20, 1989, 1577 U.N.T.S. 3 (prohibiting trafficking of children, exploitation of children, and forced or exploitative labor); Convention on the Elimination of All Forms of Discrimination Against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13 (prohibiting exploitation of the prostitution of women); International Agreement for the Suppression of the “White Slave Traffic,” May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 (providing protections for trafficked women).

<sup>30</sup> 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].

<sup>31</sup> See *infra* notes 45-49 and accompanying text (discussing requirements of the Convention Against Transnational Organized Crime and the resulting Trafficking Victims Protection Act in the United States).

discourse of migrant criminality that ironically increases the vulnerability of migrants to exploitation.

A. *Trafficking as an Immigration Crime*

The Trafficking Protocol was part of a broader effort by states to carve out an international cooperative agreement on transnational crime.<sup>32</sup> This effort included not only a transnational crime convention<sup>33</sup> and supplementary treaties on trafficking and migrant smuggling<sup>34</sup> but also side agreements on illicit small-arms manufacture and trade.<sup>35</sup> As such, treaty negotiators quite correctly and understandably treated international trafficking as a subset of international crime.<sup>36</sup> Trafficking is a crime. Therefore, it is neither surprising nor problematic to treat trafficking as a worthy subject of international criminal law and to use criminal law as a tool for deterring and punishing trafficking offenses.<sup>37</sup> Indeed, failure to prioritize trafficking crimes was akin to other international legal failures to address concerns emerging within the spheres of work and home—areas that were construed as “private” and where, not coincidentally, great harms were visited against socially marginalized groups, particularly women and children.

Nevertheless, in placing the trafficking issue within the framework of an international criminal convention, the Trafficking Protocol

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<sup>32</sup> See Gallagher, *supra* note 1, at 789-90 (recounting the initial meetings that eventually led to the Trafficking Protocol).

<sup>33</sup> United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 2225 U.N.T.S. 209.

<sup>34</sup> Protocol Against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 2241 U.N.T.S. 480. Smuggling is defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” *Id.* art. III, ¶ a.

<sup>35</sup> Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (June 8, 2001).

<sup>36</sup> See Trafficking Protocol, *supra* note 30, pmb., at 343 (“[S]upplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime . . .”).

<sup>37</sup> See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 56-59 (2000) (discussing and dissecting this public/private dichotomy); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237-40 (1989) (locating much of the discrimination faced by women outside the sphere of public recognition and protection).

shifted antitrafficking priorities from the protection of human rights to the prosecution of international criminals.<sup>38</sup> Critics assert that, in so doing, the Trafficking Protocol took an approach to antitrafficking that bolstered international prosecutorial efforts at the expense of international efforts—and agencies—dedicated to enhancing international human rights.<sup>39</sup> Moreover, this approach allowed governments to implement harsh border-control measures under the guise of instituting antitrafficking legislation.<sup>40</sup>

In response to this criticism, defenders of the Trafficking Protocol approach have noted that, prior to the treaties negotiated at Palermo, the international community was not taking any truly effective measures to combat the international trafficking problem.<sup>41</sup> While a prosecution-centered approach has drawbacks, it has the virtue of attracting international attention to the issue of trafficking and motivating powerful state actors to consider the trafficking problem worthy of both international and domestic attention. Prior to the negotiation of the

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<sup>38</sup> See, e.g., Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1, 4 (2004) (noting that, with regard to trafficking, “the predominant approach has come from a law enforcement perspective”); Janie Chuang, *The United States As Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 448 (2006) (noting the nonobligatory nature of the victim-protection provisions); Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 976, 989 (2001) (noting that the law enforcement concerns dominated negotiations and that victim-protection provisions of the Protocol are not obligatory); see also Gallagher, *supra* note 1, at 790-91 (noting that the Protocol did a better job with regard to establishing a structure for punishing traffickers than for protecting the rights of victims, but observing that sufficient (particularly regional) mechanisms exist to fill that gap).

<sup>39</sup> See, e.g., Hathaway, *supra* note 1, at 4-6 (“[T]he fight against human trafficking is more fundamentally in tension with core human rights goals than has generally been recognized.”). *But cf.* Gallagher, *supra* note 1, at 792-93 (noting several advantages to the international human rights approach vis-à-vis the criminal approach, but ultimately concluding that the latter approach has had greater practical effect).

<sup>40</sup> See Hathaway, *supra* note 1, at 6 (“[T]he border control emphasis inherent in the Trafficking Protocol and its companion Smuggling Protocol has provided states with a reason—or at least a rationalization—for the intensification of broadly based efforts to prevent the arrival or entry of unauthorized noncitizens.”).

<sup>41</sup> Anne Gallagher noted this point in her response to James Hathaway:

Despite an impressive array of international legal protections, it was clear to our organizations that forced labor, child labor, debt bondage, forced marriage, and commercial sexual exploitation of children and adults were flourishing, unchecked in many parts of the world. . . . We all believed that trafficking was indeed an appropriate focus for international law. We also agreed that the existing international legal framework was woefully inadequate, and the chances of the human rights system coming to the rescue were slim.

Gallagher, *supra* note 1, at 790.

Trafficking Protocol, antitrafficking efforts were quite marginalized.<sup>42</sup> In contrast, since the passage of the Trafficking Protocol, international human rights organizations have been guided by the coherent definitions supplied by the criminal convention in devising and supervising responses to trafficking. In so doing, they have raised the profile of the fight against exploitation.<sup>43</sup> For defenders of the Trafficking Protocol, the gains made in the fight against international trafficking since 1999 far outweigh the costs of shifting the antitrafficking paradigm from a predominantly human rights-based to a predominantly criminal law-based approach.<sup>44</sup>

U.S. antitrafficking efforts have prompted a similar split of opinion. Comprehensive U.S. antitrafficking legislation never achieved momentum until after the completion of the Trafficking Protocol. However, the Convention Against Transnational Organized Crime, which was the parent instrument of the Trafficking Protocol, required state parties to incorporate a trafficking offense into domestic law.<sup>45</sup> In response, the United States enacted the TVPA.<sup>46</sup> With some nar-

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<sup>42</sup> See *id.* at 792 (“When trafficking belonged exclusively to human rights, there was one long ago treaty that nobody but the fringe dwellers intent on abolishing prostitution cared about, occasional, confused reports emanating from a marginal and marginalized body (the UN Working Group on Contemporary Forms of Slavery), and very little else. . . . [N]ot even the treaty bodies were much help.” (footnote omitted)). For a more detailed critique of the Working Group on Contemporary Forms of Slavery, see, for example, Hathaway, *supra* note 1, at 20-24.

<sup>43</sup> See Gallagher, *supra* note 1, at 824-25 (discussing the development of international institutions and norms that have flowed from the Trafficking Protocol).

<sup>44</sup> See *id.* at 824 (arguing that the increased attention to both private and governmental obligations to prevent exploitation “lays to rest any concerns that the global campaign against trafficking has wasted effort and resources”).

<sup>45</sup> United Nations Convention Against Transnational Organized Crime, *supra* note 33, art. 34, ¶ 2. By 2008, 98 of the world’s 155 countries had “adopted a specific offence criminalizing trafficking in persons.” U.N. OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 22 (2009), available at [http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf).

<sup>46</sup> Pub. L. No. 106-386, §§ 101-113, 114 Stat. 1466, 1466-91 (codified as amended at 22 U.S.C. §§ 7101-7110 (2006)). The Council of Europe’s Convention on Action Against Trafficking in Humans entered into force on February 1, 2008; as of March 9, 2010, twenty-six countries have ratified it. See ROSARIO PARDO, COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS: HANDBOOK FOR PARLIAMENTARIANS app. II (2009), available at [http://assembly.coe.int/committeedocs/2007/Trafficking-human-beings\\_E.pdf](http://assembly.coe.int/committeedocs/2007/Trafficking-human-beings_E.pdf). The convention purports to address the trafficking problem “with a view to victim protection measures and international cooperation.” Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings and Its Explanatory Report*, ¶ 37, at 32, C.E.T.S. No. 197 (May 16, 2005), available at [http://www.coe.int/T/E/human\\_rights/trafficking/PDF\\_conv\\_197\\_trafficking\\_e.pdf](http://www.coe.int/T/E/human_rights/trafficking/PDF_conv_197_trafficking_e.pdf). It is interesting that the European Convention highlights protection, whereas the U.S. model implicitly elevates prosecution as the most important antitrafficking goal.

rowing, it borrowed the international definition of trafficking<sup>47</sup> and also engaged in an approach focused on prosecution of traffickers, prevention of trafficking, and protection of victims.<sup>48</sup> One of the most frequent criticisms of the U.S. antitrafficking legislation is that it overemphasizes prosecution, and that it often does so at the expense of victim protection.<sup>49</sup>

As in the context of the International Protocol, it is important not to overstate this argument. First of all, it is not clear that antitrafficking legislation aimed primarily at victim protection would have garnered congressional support. To the extent that positive steps have been taken toward curbing international trafficking, it is only because advocates recognized the strong support that could be brought to bear for a prosecution-centered bill.<sup>50</sup> Second, the TVPA created the legisla-

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<sup>47</sup> See Chacón, *supra* note 10, at 2984-85 (noting that the TVPA provides protections and benefits only for victims of “severe forms of trafficking in persons”—a category that is slightly narrower than that covered by the Protocol’s definition of trafficking).

<sup>48</sup> See 22 U.S.C. § 7101 (a) (laying out the threefold purposes of the Act).

<sup>49</sup> See, e.g., Claire Bishop, *The Trafficking Victims Protection Act of 2000: Three Years Later*, 41 INT’L MIGRATION 219, 227 (2003) (advocating for a two-step immigration process in order to fulfill the law enforcement and victim-protection goals); Bravo, *Exploring*, *supra* note 1, at 240-43 (questioning whether trafficking can be solved without greater attention to root causes); Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT’L L. 1143, 1166-67 (2003) (arguing that more than simple law enforcement is needed to combat trafficking); Haynes, *supra* note 19, at 345-46 (asserting that victim protection is often conditioned on the willingness of victims to cooperate with law enforcement); Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding the Victim Protection Act Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 381 (2005) (arguing that the Act is more concerned with prosecution than victim protection); Srikantiah, *supra* note 19, at 159-60 (arguing that allocating the responsibility for identifying trafficking victims to law enforcement investigators and prosecutors leads to “a failure to identify . . . those who do not present themselves as good prosecution witnesses” and yields “non-uniform results”); Joyce Koo Dalrymple, Book Note, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. THIRD WORLD L.J. 451, 454-56 (2005) (reviewing CRAIG MCGILL, HUMAN TRAFFIC: SEX, SLAVES & IMMIGRATION (2003)) (maintaining that the requirements trafficking victims must meet to qualify for protection are overly stringent); *Developments in the Law: Jobs and Borders*, 118 HARV. L. REV. 2171, 2193-2202 (2005) (positing that the overemphasis of prosecution-oriented components of the TVPA, relative to components of the Act dedicated to victim protection and global prevention, accounts for the Act’s shortcomings).

<sup>50</sup> The TVPA and the accompanying immigration-related provisions of the Violence Against Women Act (VAWA) are among the very few recent pieces of legislation that liberalize immigration in any way. Almost all immigration-related legislation, and certainly all major immigration bills passed since 1990, have increased restrictions on migration and eased barriers to removal. See, e.g., Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (codified as amended at 8 U.S.C. §§ 1101, 1103, 1701 (2006)); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended

tive impetus behind the State Department's annual Trafficking in Persons (TIP) report, which has come to function as an influential monitoring and unilateral compliance regime for international trafficking.<sup>51</sup> Finally, sustained criticism of the original TVPA as insufficiently attentive to humanitarian and human rights concerns has yielded a number of ameliorative developments in the passage of reauthorizing legislation in 2003, 2005, and 2008, as well as in the implementation of regulations. Collectively, these changes have helped to address some of the flaws in the initial legislation that tilted it too heavily toward the needs of prosecutors at the expense of victims.

One example of an ameliorative development in reauthorizing legislation is the change that Congress made to the requirements for the T visa.<sup>52</sup> A T visa is the means by which a noncitizen victim of trafficking can obtain temporary lawful status, which can be converted into lawful permanent residency in some cases.<sup>53</sup> In order to receive a T visa, the noncitizen must be "a victim of a severe form of trafficking in persons," must be present in the United States, and, perhaps most controversially, must assist law enforcement by cooperating with "any reasonable request" from a law enforcement agent concerning the investigation and prosecution of her trafficker.<sup>54</sup> In the 2005 reauthori-

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in scattered sections of 8 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-587 (codified as amended in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 and 42 U.S.C.).

<sup>51</sup> See Gallagher, *supra* note 1, at 826-27 (exploring the function of the TIP report). There are many criticisms of the State Department's methodology and practices with regard to the TIP report. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTI-TRAFFICKING EFFORTS ABROAD 26-28 (2006), available at <http://www.gao.gov/new.items/d06825.pdf> (listing credibility problems with the TIP reports). Moreover, because of the imperfect overlap between U.S. antitrafficking goals and international trafficking policy, it is not clear that State Department monitoring and threats of sanctions effectively advance the specific goals of the international antitrafficking regime. See, e.g., Chuang, *supra* note 38, at 466-73 (comparing U.S. and international antitrafficking goals). But the reports have highlighted and encouraged action on a number of international trafficking issues that had previously received insufficient attention.

<sup>52</sup> The T visa was created by section 107(e) of the TVPA. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 107(e), 114 Stat. 1466, 1477-79 (codified as amended at 8 U.S.C. § 1101(15)).

<sup>53</sup> After three years in "T status," T visa recipients may apply for permanent residency pursuant to immigration regulations governing status adjustments. See 8 U.S.C. § 1255(l).

<sup>54</sup> 8 U.S.C. § 1101(a)(15)(T)(i)(I). A T visa requires a determination by the Attorney General and the Secretary of Homeland Security that the noncitizen (1) is a victim of a "severe form of trafficking," as defined in 22 U.S.C. § 7102 (2006); (2) "is physically

zation of the TVPA, Congress relaxed the law enforcement cooperation requirement by allowing the Secretary of Homeland Security, in consultation with the Attorney General, to find a request from law enforcement officials “unreasonable” if “a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance.”<sup>55</sup> Although further liberalizing adjustments are certainly in order,<sup>56</sup> these changes suggest that pressure by critics<sup>57</sup> to better align the balance between prosecution and protection is having an effect.

A second example of an improvement in antitrafficking legislation in the years since the 2000 enactment of the TVPA is the addition of a private right of action for trafficking victims who wish to bring civil actions against their traffickers.<sup>58</sup> Individuals who have suffered severe forms of exploitation can now bring lawsuits in cases in which the government did not choose to proceed with criminal trials. One of the areas in which this is having effect is cases involving labor exploitation. Throughout the TVPA’s existence, the government has prosecuted fewer cases of labor trafficking than sex trafficking.<sup>59</sup> Moreover,

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present in the United States” or its territories or possessions, or a port of entry thereto; (3) “has complied with any reasonable request for assistance” in the investigation or prosecution of acts of trafficking; and (4) would suffer “extreme hardship involving unusual and severe harm upon removal.” See 8 U.S.C. § 1101(a)(15)(T)(i).

<sup>55</sup> 8 U.S.C. § 1101(a)(15)(T)(iii).

<sup>56</sup> See Srikantiah, *supra* note 19, at 181 n.141 (noting that law enforcement agents are likely to implement this statutory provision in the same manner as the certification required under 8 U.S.C. § 1101(a)(15)(T)(i) and therefore that “prosecutors and investigators will continue to serve in a gate-keeping function as to identification of trafficking victims”).

<sup>57</sup> For an earlier criticism of the law enforcement certification requirement, see Sadruddin et al., *supra* note 49, at 410-13, in which the authors propose an exception to certification be allowed in some cases. The T visa was based on the model used for the S visa. Because the T visa is based on the model of prior visas designed to assist law enforcement, it is not designed primarily to protect victims’ rights. See Chacón, *supra* note 10, at 3026-27 (criticizing the reliance on the S visa model without sensitivity to the different contexts in which the two visas are issued).

<sup>58</sup> 18 U.S.C. § 1595 (2006).

<sup>59</sup> See ATT’Y GEN. 2008 TRAFFICKING REPORT, *supra* note 22, at 38 (“In FY 2008, ICE opened 432 human trafficking investigations, which consisted of 170 investigations of forced labor and 262 investigations of commercial sexual exploitation . . . ICE made 189 criminal arrests for offenses related to human trafficking. Of the 189 arrests, 128 were for crimes involving sexual exploitation and 61 were for forced labor related violations.”); CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001–2005, at 25-27 (2006), available at [http://www.justice.gov/crt/crim/part\\_5.pdf](http://www.justice.gov/crt/crim/part_5.pdf) [hereinafter DOJ REPORT] (presenting statistics on sex trafficking and labor trafficking cases filed); see also Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 336 (2007) (noting that sex trafficking prosecutions are more numerous than labor trafficking prosecutions and arguing that “[t]hese

the government's labor trafficking prosecutions have tended to focus on noncitizens, not on U.S. companies.<sup>60</sup> By contrast, private actions brought under the TVPA have targeted, among other entities, corporations that have engaged in exploitative labor practices.<sup>61</sup> Of course, it would be overstating the matter to claim that the addition of the private right of action has had a very large impact on the trafficking problem. Empirical study has demonstrated that only a small handful of complainants have filed such suits since the creation of the right of action in 2003.<sup>62</sup> Nevertheless, the private right of action, which is mirrored in several state antitrafficking provisions,<sup>63</sup> provides another example of a liberalizing measure undertaken in response to outside critiques of the TVPA.<sup>64</sup>

A third improvement to the TVPA is that with each reauthorization, the TVPA has expanded the scope of legal protections available to migrants who are minors. This is true even for children who are not victims of trafficking. The 2008 reauthorization provides for voluntary departure<sup>65</sup> for minors at no expense to the child<sup>66</sup> and also re-

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numbers are disproportionate to estimates from non-governmental organizations and academic researchers asserting that approximately one-half to two-thirds of all trafficking in the U.S. occurs in non-sex related industries").

<sup>60</sup> See, e.g., ATT'Y GEN. 2008 TRAFFICKING REPORT, *supra* note 22, app. B at 83-86 (listing "examples of cases," none of which involve corporate defendants).

<sup>61</sup> See, e.g., David v. Signal Int'l, LLC, No. 08-1220, 2009 WL 5215326, at \*2 (E.D. La. Dec. 28, 2009) (explaining that plaintiffs alleged "horrible" conditions); Complaint, Adhikari v. Daoud & Partners, No. 08-05626, 2008 WL 3978577 (C.D. Cal. Aug. 27, 2008) (alleging human trafficking by a corporation). Indeed, one empirical study conducted in 2007 found no civil claims of sex trafficking but identified thirty-four labor trafficking allegations across eighteen separate complaints. See Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1671 (2007) (examining U.S. District Court complaints alleging claims under 18 U.S.C. § 1595).

<sup>62</sup> See Nam, *supra* note 61, at 1671 (arguing that the number of cases filed "pales in comparison" to the estimated number of trafficking incidents).

<sup>63</sup> See, e.g., CAL. CIV. CODE § 52.5 (West 2007) (allowing civil suits for trafficking violations); CONN. GEN. STAT. § 52-571i (Supp. 2009) (authorizing civil actions for trafficking victims); FLA. STAT. ANN. § 772.104 (West 2005 & Supp. 2009) (allowing civil suits); IND. CODE ANN. § 35-42-3.5-3 (West Supp. 2008) (allowing civil trafficking suits).

<sup>64</sup> See Kathleen Kim & Kusia Hreschynshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1 (2004) (exploring the benefits of the private right of action); Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247 (same).

<sup>65</sup> "Voluntary departure" is a legal term of art defined as per the parameters established by the Immigration and Nationality Act (INA) § 240B, 8 U.S.C. § 1229c (2006).



quires that, “to the greatest extent practicable,” the Secretary of Health and Human Services provide unaccompanied minors with access to counsel, including free access where necessary.<sup>67</sup> These and other changes to the legal status of noncitizen minors<sup>68</sup> provide direct and indirect means of identifying and protecting child trafficking victims.

On the regulatory side, guidelines for the U visa, which was created in the 2000 TVPA, were finally promulgated in September 2007.<sup>69</sup> The U visa provides a mechanism for normalizing the status of noncitizens who may not be eligible for T visas because they do not qualify as victims of “severe form[s] of trafficking in persons.”<sup>70</sup> The U visa provides an alternative remedy for these individuals and also opens up a possible means of protecting a range of individuals who, although not “trafficking victims,” have been subjected to various forms of exploitation and abuse, including labor exploitation.<sup>71</sup>

These, and other, changes that Congress—and, in the case of the U visa regulations, the executive branch—have made to the TVPA over the past decade illustrate the positive effect of sustained criticism regarding the TVPA’s initial overemphasis on criminal enforcement at the expense of victim protection. These changes do not, however, alter the fundamental balance of the law, which still prioritizes prosecution over victim protection. That implementation of antitrafficking efforts by the Department of Homeland Security has been situated in the Immigration and Customs Enforcement (ICE) branch of the Department, rather than U.S. Citizenship and Immigration Services

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<sup>66</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(a)(5)(D)(ii), 122 Stat. 5044, 5077 (codified as amended at 8 U.S.C. § 1232(a)(5)(D)(ii)).

<sup>67</sup> *Id.* § 235(c)(5) (codified as amended at 8 U.S.C. § 1232(c)(5)).

<sup>68</sup> For a complete discussion of the legal relief provided for minors under the 2008 reauthorization, see generally Deborah Lee et al., *Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, AILA InfoNet Doc. No. 09021830 (Feb. 19, 2009).

<sup>69</sup> The Department of Homeland Security (DHS), through the United States Citizenship and Immigration Services (USCIS), issued the U visa regulation on September 17, 2007, which became effective thirty days after its approval. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a & 299 (2009)).

<sup>70</sup> 8 U.S.C. § 1101(a)(15)(T)(i)(I); see also *supra* note 54 (discussing T visa requirements).

<sup>71</sup> New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,036. For a complete discussion of how the U visa could be used as a tool to enhance workplace protection, see Saucedo, *supra* note 13.

(USCIS),<sup>72</sup> demonstrates that the capture and prosecution of traffickers is the mechanism by which DHS hopes to address the trafficking problem. Victim assistance is subjugated to the first-order priority of immigration enforcement.

As in the context of domestic violence, one could justify a law enforcement–centered approach by arguing that the government’s willingness to use the criminal law as a tool to combat trafficking demonstrates its serious commitment to dealing with this issue.<sup>73</sup> When antitrafficking policy is limited to humanitarian responses to victims, this can send a signal to perpetrators that their actions are not serious enough to warrant criminal punishment. Obviously, this is not the message that the government ought to send to traffickers.

On the other hand, one can accept the need to treat trafficking as a serious crime and still design a system that strikes a different balance between prosecution and victim protection.<sup>74</sup> For example, a victim-centered approach to antitrafficking policy would not contain a default requirement that victims of trafficking undergo the difficulties of partic-

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<sup>72</sup> See Press Release, U.S. Immigration and Customs Enforcement, ICE Gives Voice to Victims of Human Trafficking in the United States (Nov. 2, 2009) [hereinafter ICE Press Release], available at <http://www.ice.gov/pi/nr/0911/091102washingtondc.htm> (“As a primary mission area, ICE has the overall goal of preventing human trafficking in the United States by prosecuting the traffickers, and rescuing and protecting the victims.”). During the Symposium at which this Article was presented, J.J. Rosenbaum discussed the difficulties that arise from the fact that ICE does the initial law enforcement screening to determine whether an individual qualifies as a trafficking victim. J.J. Rosenbaum, Remarks at the University of Pennsylvania Law Review Symposium: Trafficking in Sex and Labor: Domestic and International Responses (Nov. 13, 2009).

<sup>73</sup> For a discussion and critique of the ways in which sexual and domestic violence long have been considered part of the “private” sphere and not subject to public legal constraints, see, for example, ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 87-97 (2000) and Sally Goldfarb, *Public Rights for “Private” Wrongs: Sexual Harassment and the Violence Against Women Act*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 516 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

<sup>74</sup> See, e.g., Carole Angel, *Immigration Relief for Human Trafficking Victims: Focusing the Lens on the Human Rights of Victims*, 7 MD. L.J. RACE, RELIGION, GENDER & CLASS 23, 31 (2007) (arguing for a decoupling of criminal law goals from efforts to provide aid to victims); Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 NEV. L.J. 826, 831 (2007) (same); Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN’S L.J. 77, 98 (2002) (same); Charles Song & Suzy Lee, *Between a Sharp Rock and a Very Hard Place: The Trafficking Victims Protection Act and the Unintended Consequences of the Law Enforcement Cooperation Requirement*, 1 INTERCULTURAL HUM. RTS. L. REV. 133, 135 (2006) (same); Jayashri Srikantiah, Remarks at the University of Pennsylvania Law Review Symposium: Trafficking in Sex and Labor: Domestic and International Responses (Nov. 13, 2009) (proposing modifications of the law enforcement certification requirements for T visas).

ipating in criminal prosecution<sup>75</sup> in order to receive protection. Eliminating such barriers to victim protection would be consistent with the government's approach in other areas of the law. A domestic violence victim, for example, is not required to serve as a prosecution witness against her abuser to receive a restraining order or shelter; she is simply entitled to these legal and physical protections. The same ought to be true of the trafficking victim. A human rights-centered approach would link the protection of victims directly to the violation, not to the needs of the government seeking to prosecute the violation.<sup>76</sup>

What complicates the situation in the case of the noncitizen trafficking victim in need of a T visa is that the victim frequently is present in the United States in violation of the nation's immigration laws. Policymakers are clearly reluctant to develop any antitrafficking policies that could potentially encourage unlawful immigration.<sup>77</sup> Lawmakers seek to maintain clear distinctions between noncitizens who have voluntarily contracted to be smuggled into the country and those who are here as a direct consequence of force, fraud, or coercion.<sup>78</sup>

The vigilant policing of the line between smuggling and trafficking occurs not only in the United States but in all developed countries. One writer has characterized this line as "an all-important line in the battle for sovereignty and the nation-state as traditionally understood, and for maintaining the clear bright line between us and

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<sup>75</sup> See, e.g., Sadruddin et al., *supra* note 49, at 398-406, 413-16 (describing the psychological trauma associated with being trafficked and testifying as a trafficking victim in a criminal trial).

<sup>76</sup> See DAUVERGNE, *supra* note 27, at 85. The linking of legal protections to cooperation with law enforcement is increasingly common in immigration law. See, e.g., Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1073 (2002) ("[I]mmigration law . . . can also be employed as an incentive or a reward for cooperation and information provided in criminal investigations. This reward function has grown in importance as other immigration benefits have been restricted or eliminated, including deportation waivers.").

<sup>77</sup> See Chacón, *supra* note 10, at 3021-22 (describing congressional opposition to providing assistance to trafficking victims who consented to their initial smuggling but later became victims of exploitation); Srikantiah, *supra* note 19, at 191 n.194 ("The House Judiciary Committee, for example, imposed an annual cap of five thousand T visas '[i]n order that this bill never become a general amnesty program for smuggled aliens.' Representative Chris Smith, the bill's sponsor, explained that the cap was necessary to 'prevent this form of relief from being abused' and 'prevent large numbers of aliens from falsely claiming to be trafficking victims.'" (citation omitted) (quoting H.R. REP. NO. 106-487, pt. 2, at 18 (2000); 146 CONG. REC. 18,056, 18,056-57 (2000) (statement of Rep. Smith))).

<sup>78</sup> See Chacón, *supra* note 10, at 3022-23 (explaining that under the TVPA, assistance is limited for "individuals who may have played some volitional role in their transportation and employment, but who are now trapped in virtual slavery").

them that keeps the status quo for migration law in place.”<sup>79</sup> This observation raises the fundamental critique to which I now turn: while antitrafficking legislation has been revised to better assist victims, at a broader level, antitrafficking discourse at times has drawn upon and perpetuated a discourse that compounds myths of migrant criminality.

### B. *Victim Vulnerability and the Myth of Migrant Criminality*

As previously noted, global social, economic, and political forces have contributed in complex ways to the development of the international trafficking epidemic.<sup>80</sup> Yet the discourse around trafficking—including media coverage of trafficking, law enforcement antitrafficking training efforts, and official statements on trafficking—has tended to focus not on these complex global forces but on particularly “bad actors.” The “bad actors” that are scrutinized tend to be other noncitizens involved in supplying certain markets with trafficked persons rather than the population that consumes the goods and services that these trafficking victims provide.

One can see this in the Department of Justice’s public statements concerning antitrafficking prosecutions. For several years, the Department frequently published trafficking bulletins in which it discussed its successful trafficking prosecutions.<sup>81</sup> Although that practice has ended, the Department continues to publicize its successful trafficking prosecutions<sup>82</sup> and to summarize some of the most notable cases in its annual report to Congress.<sup>83</sup> The striking feature of the case summaries is that they highlight cases in which virtually every defendant is a noncitizen or member of a minority racial group.<sup>84</sup> None of the cases listed in the Attorney General’s 2008 report involves a corporate defendant.<sup>85</sup> ICE, which is now tasked with the mission of antitrafficking enforcement, takes a similar approach; a recent press

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<sup>79</sup> DAUVERGNE, *supra* note 27, at 70; *see also id.* at 90-92 (providing examples regarding this distinction).

<sup>80</sup> *See supra* notes 1-13 and accompanying text.

<sup>81</sup> For a summary of the cases discussed in several of these bulletins, *see* Chacón, *supra* note 10, at 3036 n.341.

<sup>82</sup> *See* ATT’Y GEN. 2008 TRAFFICKING REPORT, *supra* note 22, at 41 (reporting that the Civil Rights Division and the United States Attorneys’ Offices collectively investigated a record-setting 183 trafficking cases, “charged 82 defendants in 40 cases[,] and obtained 77 convictions” in fiscal year 2008).

<sup>83</sup> *See id.* app. B at 83-86.

<sup>84</sup> *Id.* For a description of the three possible exceptions—*United States v. Webster*, *United States v. Corliss*, and *United States v. Pepe*—*see id.* app. B, at 85.

<sup>85</sup> ATT’Y GEN. 2008 TRAFFICKING REPORT, *supra* note 22, app. B at 83-86.

release discussing ICE antitrafficking efforts highlights two cases.<sup>86</sup> The first involved defendants Lassissi Afolabi, Akouavi Kpade Afolabi, Derek Hounakey, and Geoffrey Kouevi, who were involved in large-scale trafficking and smuggling activities.<sup>87</sup> The second involved defendants Amador Cortes-Meza, Francisco Cortes-Meza, Raul Cortes-Meza, Juan Cortes-Meza, and Edison Wagner Rosa-Tort of Atlanta, who were engaged in smuggling and trafficking activities, including trafficking minors into prostitution.<sup>88</sup> Both of these cases involved serious acts of trafficking. There is no doubt that the perpetrators of such crimes deserve punishment. On the other hand, in using these cases to highlight ICE enforcement efforts on the very page on which ICE requests public participation in reporting trafficking, ICE primes the public to look for—and report—a certain kind of trafficker.

The choices made by the government concerning which prosecutions to publicize may be overdetermined. A significant number of traffickers are noncitizens. That is inevitable given the international nature of the industry and the fact that many of the vulnerable populations subject to exploitation live in developing countries. Moreover, some traffickers operating in the United States are noncitizens—including coethnics who exploit individuals in their own communities who lack legal status.

At the same time, it is clear that there must be a broader market for the services provided by trafficked workers and that middle-class citizens of all backgrounds are implicated in exploitation. The antitrafficking law very clearly provides tools for prosecuting those who knowingly profit from trafficked labor—a provision that ought to allow for a prosecution strategy that targets demand more effectively. For example, many well-known corporations have profited from the low cost of vulnerable migrant labor forces.<sup>89</sup> While these companies

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<sup>86</sup> ICE Press Release, *supra* note 72.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., Sherri Day, *Jury Clears Tyson Foods in Use of Illegal Immigrants*, N.Y. TIMES, Mar. 27, 2003, at A14 (noting that Tyson managers were exonerated in a jury trial but including concessions from one defendant that “there were people at Tyson who had done things wrong” in hiring unauthorized workers, although “he and the other two men charged had no knowledge of what their colleagues were doing”); Steven Greenhouse, *Wal-Mart to Pay U.S. \$11 Million in Lawsuit on Immigrant Workers*, N.Y. TIMES, Mar. 19, 2005, at A1 (discussing Wal-Mart’s settlement with the federal government regarding accusations it employed illegal immigrants to clean its stores); Julia Preston, *Child Labor Charges Are Sought Against Kosher Meat Plant in Iowa*, N.Y. TIMES, Aug. 6, 2008, at A15 (discussing widespread labor violations at a meatpacking plant that was the site of a massive immigration enforcement raid in May 2008).

and their executives have sometimes been fined in connection with immigration violations and other criminal matters,<sup>90</sup> none has had to face trafficking penalties.

Antitrafficking policy at the state level appears to follow the same patterns as federal antitrafficking prosecutions, though the data available at the state level are sparser than at the federal level. In spite of a huge wave of antitrafficking legislation enacted at the state level over the past decade,<sup>91</sup> very few individuals have been prosecuted for violating state antitrafficking laws.<sup>92</sup> Of the few who have been prosecuted, available evidence suggests that they tend to be individuals prosecuted for sex trafficking (usually of children).<sup>93</sup> Many state officials maintain that they do not believe that trafficking is an issue in their jurisdiction.<sup>94</sup>

As officials have worked to train individuals to recognize trafficking situations, the training internalizes the message that trafficking is perpetrated by foreign criminal organizations and is best solved through aggressive policing at the border.<sup>95</sup> Framing trafficking as a

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<sup>90</sup> For a compelling discussion of the inefficacy of these relatively low and infrequently imposed fines, see generally Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193.

<sup>91</sup> For a list of recently enacted state laws concerning trafficking, see note 164. See also HEATHER J. CLAWSON ET AL., ICF INT'L, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES 4 (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf> (noting that, at that time, thirty states and U.S. territories had enacted statutes for prosecuting human trafficking).

<sup>92</sup> Of the seventy-seven state officials surveyed by Clawson et al., only seven percent—or about five officials—had prosecuted trafficking cases, although “some” mentioned referrals to federal officials. *Id.* at 23-24.

<sup>93</sup> See, e.g., *Jackson v. State*, No. 103-0091, 2003 Minn. App. LEXIS 1316, at \*10 (Minn. Ct. App. Nov. 4, 2003) (affirming the conviction of a defendant under the pre-TVPA provision of a statute prohibiting the promotion of prostitution of a minor); *State v. Daugherty*, 744 S.W.2d 849, 851-54 (Mo. Ct. App. 1988) (affirming the conviction of a defendant for sex trafficking under a pre-TVPA provision criminalizing the purchase of a child for adoption); *Buggs v. State*, No. 05-07-00676, 2008 Tex. App. LEXIS 1499, at \*15-17 (Tex. Ct. App. Feb. 29, 2008) (affirming convictions for trafficking in persons, aggravated kidnapping, and compelling prostitution in a case involving the long-running forced prostitution of a fourteen-year-old victim who met the defendant at a bus stop). But see *Ramos v. State*, No. 13-06-00646, 2009 Tex. App. LEXIS 7837, at \*2-10 (Tex. Ct. App. Oct. 8, 2009) (affirming the conviction of a defendant under a state trafficking offense for using threats regarding immigration status to coerce two women from Mexico to work without compensation at an adult daycare center).

<sup>94</sup> See CLAWSON ET AL., *supra* note 91, at 23 (reporting that sixty-eight percent of prosecutors surveyed did not consider human trafficking to be a problem in their jurisdiction).

<sup>95</sup> See, e.g., *The Rise of the Mexican Drug Cartels and U.S. National Security: Hearing Before the H. Oversight & Government Reform Comm.*, 111th Cong. (2009) (statement of Todd Owen, Acting Deputy Assistant Comm'r, Office of Field Operations, U.S. Customs and Border Protection, Department of Homeland Security), available at <http://oversight>.

crime perpetrated by foreigners both fits within and fuels a popular discourse in which the noncitizen is perceived as a criminal threat.<sup>96</sup>

The image of trafficking as a foreign evil perpetrated by minorities and migrants has at least two collateral effects that actually complicate rather than complement antitrafficking efforts. First, it fuels a problematic notion of the noncitizen as criminal threat, which in turn has policy implications that actually undercut trafficking protections. Second, this approach leaves the large demand for trafficked labor unaffected and unnamed. Each of these issues is discussed in turn.

First, this approach fuels exaggerated public perceptions of the noncitizen as a criminal or terrorist.<sup>97</sup> It is quite efficient as a policy matter to focus on trafficking cases involving defendants who are generally unwelcome in the polity to begin with and who are unlikely to be able to mount effective defenses. It is certainly easier than prosecuting companies with teams of lawyers or defendants who might garner more sympathy than the noncitizens they have exploited. Un-

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house.gov/images/stories/documents/20090708190119.pdf (describing antitrafficking efforts at the border and characterizing them as complementary to DHS's "Secure Border Initiative"); *Law Enforcement Responses to Mexican Drug Cartels: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Congress 3-4 (2009) (statement of Terry Goddard, Att'y Gen. of the State of Arizona) (discussing human trafficking as one of a number of problems that can be combated through interagency investigations, raids, and prosecutions in the border region); Randall Mikkelsen, *Obama Mexico Border Plan Not Enough—U.S. Senator*, REUTERS, Mar. 25, 2009, <http://www.reuters.com/article/idUSN25352630> (reporting Senator Joseph Lieberman's complaint that the President's border initiative was insufficient and that he would "try to quickly pass funding to hire 1,600 more Customs and Border Patrol agents and extra immigration officers, build up law enforcement centers and fight human trafficking"); cf. 155 CONG. REC. H5258, H5258-60 (daily ed. May 6, 2009) (containing discussion of H.R. Res. 14, 111th Cong. (2009), a resolution "recognizing the importance of the Border Patrol in combating human smuggling," in which members frequently used "smuggling" and "trafficking" interchangeably—for example, Representative Cohen characterized trafficking as a form of smuggling—and asserted that border apprehensions and prosecutions of "traffickers" are the key to ending trafficking).

<sup>96</sup> See *infra* note 98. Several authors have also noted that the rise of white victims has been an important counterpoint to this racialized portrait of traffickers. See, e.g., DAUVERGNE, *supra* note 27, at 74; Jacqueline Berman, *(Un)Popular Strangers and Crises (Un)Bounded: Discourses of Sex-Trafficking, the European Political Community and the Panicked State of the Modern State*, 9 EUR. J. INT'L REL. 37, 60-62 (2003) (discussing political implications of the race and gender of victims); Kamala Kempadoo, *The Migrant Tighrope: Experiences from the Caribbean* (discussing the relevance of race in the sex trade), in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 124, 130-31 (Kamala Kempadoo & Jo Doezema eds., 1998).

<sup>97</sup> See Chacón, *supra* note 4, at 1835-56 (discussing how noncitizens—particularly unauthorized migrants—have been constructed as criminal and national security threats). For a discussion of the links drawn between antitrafficking and antiterrorism measures, see *infra* note 115 and accompanying text.

fortunately, presenting trafficking as a product of certain nefarious noncitizens reinforces problematic notions of the noncitizen as inherently more criminally inclined than her citizen counterparts.<sup>98</sup> It also reinforces the flawed notion that the solution to the trafficking problem is simply to keep migrants out of the country.

Moreover, as a matter of public messaging, such efforts actually hinder efforts to humanize and make a case for assisting victims of trafficking. Traffickers are portrayed as perpetrators of a “special evil” akin to terrorism.<sup>99</sup> This characterization makes it more difficult to conceive of ordinary citizens and corporations as perpetrators of trafficking; trafficking is, in this account, a crime that outsiders who pose unique threats to public safety commit.<sup>100</sup> Yet reliance on the trope of the dangerous noncitizen fuels policies that actually complicate anti-trafficking efforts. Citizen fears of migrants as criminals fuel a drive for more restrictionist immigration policies.<sup>101</sup> Such policies can fru-

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<sup>98</sup> Numerous studies have pointed to the gap between public perception and actual data on this question. See, e.g., Matthew T. Lee et al., *Does Immigration Increase Homicide? Negative Evidence from Three Border Cities*, 42 SOC. Q. 559, 560, 571-74 (2001) (concluding that there is no correlation between recent immigration and higher crime rates); Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION INFO. SOURCE, June 2006, <http://www.migrationinformation.org/Feature/display.cfm?id=403> (“In the absence of rigorous empirical research, myths and stereotypes about immigrants and crime often provide the underpinnings for public policies and practices . . . .”); Robert J. Sampson, *Open Doors Don’t Invite Criminals*, N.Y. TIMES, Mar. 11, 2006, at A15 (“[E]vidence points to increased immigration as a major factor associated with the lower crime rate of the 1990s . . . .”); Kristin F. Butcher & Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration* 4-11 (Nat’l Bureau of Econ. Research, Working Paper No. 6067, 1997) (suggesting reasons why immigrant institutionalization rates lag behind native institutionalization rates); see also Eyal Press, *Do Immigrants Make Us Safer?*, N.Y. TIMES, Dec. 3, 2006, at E20 (describing the existing scholarship addressing this topic).

<sup>99</sup> See, e.g., President George W. Bush, Statement to the United Nations General Assembly (Sept. 23, 2003), available at <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm> (addressing the “special evil” of trafficking in the context of remarks aimed at the threat of global terrorism).

<sup>100</sup> See, e.g., *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives: Hearing Before the Subcomm. on Immigration, Border Security and Claims of the H. Comm. on the Judiciary*, 108th Cong. 33 (2004) (statement of John P. Torres, Deputy Assistant Director, Smuggling and Public Safety, U.S. Immigration and Customs Enforcement, Department of Homeland Security) [hereinafter *Pushing the Border Out Hearing*] (“[W]e recognize that human smuggling and trafficking into the United States constitute a significant risk to national security and public safety.”).

<sup>101</sup> For example, The Federation for American Immigration Reform (FAIR), an organization that “advocates a temporary moratorium on all immigration except spouses and minor children of U.S. citizens and a limited number of refugees,” FAIR: About Comprehensive Immigration Reform, <http://www.fairus.org/site/PageNavigator/about>



strate the goal of protecting migrants who are victims of trafficking not only because they cast all migrants as undesirable but also because they feed the very policies that have helped to make trafficking possible and profitable. Traffickers will continue to supply laborers to markets that cannot be satisfied through lawful channels.<sup>102</sup>

Second, this focus can deflect attention from the demands that create a market for trafficking. As the California legislature has recently worked to acknowledge, trafficking does not occur in the absence of markets.<sup>103</sup> Truly effective antitrafficking efforts need to identify which products and services trafficked workers provide and must involve strategies to curb demand for those products and services. Curbing demand must include prosecution of those who profit from trafficking labor, even when those individuals and companies do not fit the convenient profile of the paradigmatic individual, noncitizen trafficker. Current antitrafficking enforcement discourse focuses almost exclusively on targeting supply networks, while deemphasizing the demand side of the equation in the market for trafficked persons—whether for sex, cheaply produced goods, or agricultural labor. Criminal prosecutions aimed at the demand side of the trafficking problem are virtually nonexistent.

Ultimately, punishing individuals who supply trafficked labor to the market is, without question, a worthwhile goal. But efforts to punish traffickers should include systematic efforts to include punishment that targets the demand side. Currently, not only are the profiteers of trafficked human labor frequently underpunished, but the pattern of prosecutions that is actually highlighted in the promotional materials put forth by the Department of Justice and ICE helps to

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(follow “Our Purpose” hyperlink) (last visited Apr. 15, 2010), places “illegal immigration” and “crime” at the very top of the page of “immigration issues” covered, FAIR: Immigration Issue Center, <http://www.fairus.org/site/PageNavigator/issues> (last visited Apr. 15, 2010), and provides a list of crimes committed by noncitizens as an argument in favor of immigration restrictions, FAIR: Examples of Serious Crimes of Illegal Aliens, [http://www.fairus.org/site/PageServer?pagename=research\\_seriouscrime](http://www.fairus.org/site/PageServer?pagename=research_seriouscrime) (last visited Apr. 15, 2010). For a discussion of how the threat of migrant criminality was used as part of the campaign in favor of California’s Proposition 187, see Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 654 (1995).

<sup>102</sup> See Neha Misra, *The Push & Pull of Globalization: How the Global Economy Makes Migrant Workers Vulnerable to Exploitation*, HUM. RTS. BRIEF, Spring 2007, at 2-3 (arguing that where labor-market needs are unmet, “profit potential is much higher” for those employing trafficked workers than for those utilizing local labor).

<sup>103</sup> See, e.g., *Everyone’s Business: California’s Role in Combating Human Rights Violations in Product Supply Chains: Joint Informational Hearing of the S. Comm. on Labor and Industrial Relations and the S. Comm. on Judiciary*, 2009–2010 Leg. (Cal. 2009).

stoke misunderstandings of the nature of the trafficking problem. Framing the trafficking problem as one that is the sole responsibility of noncitizens and outsiders fits comfortably within the larger narrative that has been constructed around unauthorized migration.

This construction of the trafficking problem also indirectly justifies another policy outcome that is actually disadvantageous to antitrafficking efforts: the criminalization of the smuggled migrant. As previously noted, the successful passage of the TVPA depended on the creation of a clear legal distinction between criminals who violate the immigration law and victims of trafficking.<sup>104</sup> To a certain extent, this is unavoidable, and it is not inherently catastrophic for the protection of migrants' rights, provided that the resulting legal treatment of smuggled migrants comports with human rights norms.<sup>105</sup> In drafting the Palermo Protocol, the human rights community was preoccupied with the desire to ensure that smuggled migrants were not unduly criminalized as a result.<sup>106</sup>

Unfortunately, in the United States, the smuggled migrant has been subject to intense criminalization in recent years.<sup>107</sup> Policymakers have given the enforcement of immigration restrictions a very high priority, and in this equation, smuggled migrants are subject to ex-

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<sup>104</sup> See *supra* text accompanying notes 14-28. For a refutation of the notion that there is a clear distinction between trafficking and smuggling, see, for example, BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY 9 (2003); Chacón, *supra* note 10, at 3021-24; Gallagher, *supra* note 38, at 1000; Haynes, *supra* note 11, at 70.

<sup>105</sup> See Gallagher, *supra* note 1, at 790, 792 (noting the need for clear legal definitions, while also noting that to a certain extent the distinction rests on a "strange legal fiction").

<sup>106</sup> See *id.* at 790-91 ("Our focus . . . remained squarely on ensuring that drafters did not endorse criminalization of smuggled migrants . . .").

<sup>107</sup> See, e.g., Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 640 (2004) (considering "convergence between the immigration and criminal justice systems"); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms,* 64 WASH. & LEE L. REV. 469, 471-72 (2007) ("[I]mmigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model while rejecting the criminal adjudication model in favor of a civil regulatory regime."); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th,* 25 B.C. THIRD WORLD L.J. 81, 83-86 (2005) (describing consequences of the interaction between criminal justice and immigration law); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology,* 17 GEO. IMMIGR. L.J. 611, 616-20 (2003) (describing the use of the phrase "criminalization of immigration law"); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power,* 56 AM. U. L. REV. 367, 376-77 (2006) (noting the rise of "crimmigration law").

remely harsh penalties under the criminal law,<sup>108</sup> and to highly punitive policies under civil immigration law.<sup>109</sup> Treatment of migrants is thus increasingly dichotomous: either a noncitizen qualifies as a trafficking victim, in which case she can avail herself of human rights protections under the TVPA, or the noncitizen is a smuggled migrant, who is subject to detention, prosecution, criminal punishment, and removal. If an individual falls in a gray area—between an outright victim of “severe” trafficking and a smuggled migrant who is subject to everyday forms of labor exploitation—the government’s approach has been to treat the gray-area case as one involving a voluntary migrant who is not eligible for the protections available to trafficking victims.<sup>110</sup>

In some ways, the growing chasm between the treatment of trafficked victims and all other unauthorized migrants further fuels policies that limit the official scope of trafficking prosecutions. If a broader range of exploitative practices were highlighted, where appropriate, and prosecuted by the government, two things would become immediately clear. The first is that mainstream companies and individuals benefit from trafficked labor, directly and indirectly. An understanding of this complicity could lead to more rational discussions regarding issues of labor and migration. The second is that a broader range of victims would be entitled to protections than is currently the practice. Providing more individuals with legal protections and benefits would have the advantage of undermining the exploitative labor practices that have been allowed to thrive at the unpoliced intersection of labor law and immigration law.<sup>111</sup> Instead, the “special”

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<sup>108</sup> See, e.g., Chacón, *supra* note 5, at 135 & n.2 (citing authorities noting the trend in “increasingly harsh criminal consequences”).

<sup>109</sup> See, e.g., Legomsky, *supra* note 107, at 482-86 (summarizing consequences criminal convictions have on immigration status).

<sup>110</sup> See generally Srikantiah, *supra* note 19, at 191-95 (exploring how the government envisions an “iconic victim” to distinguish between voluntary migrants and trafficking victims); Kathleen Kim, *The Coercion of Trafficked Workers*, 95 IOWA L. REV. (forthcoming 2010) (manuscript at 32, on file with author) (noting that the Department of Justice tends to focus its efforts on cases involving direct physical force or restraint, and that few prosecuted cases involve other forms of coercion, despite the TVPA’s broad definition of the term). This problem is compounded when courts apply the TVPA standard of coercion in an overly narrow fashion, thereby excluding a broad range of coerced conduct that the TVPA actually protects. See Ivy Lee, Appellate Brief, *An Appeal of a T Visa Denial*, 14 GEO. J. ON POVERTY L. & POL’Y 455 (2007) (narrating the denial of a T Visa for a trafficking victim subject to nonphysical coercion); Kim, *supra* (manuscript at 31) (discussing courts’ overly narrow reading of “coercion” in post-TVPA trafficking cases).

<sup>111</sup> Recent developments in immigration law have undermined the protections of the labor law regime in cases involving unauthorized migrants, thereby ironically providing employers with even more monetary incentives to hire unauthorized workers.

nature of the harm of trafficking is highlighted and attributed to foreign forces. This depiction in turn gives rise to further “evidence” in support of widespread misperceptions of migrant criminality,<sup>112</sup> thus justifying the very border-control efforts that may, ironically, give traffickers more business.<sup>113</sup>

## II. ANTITRAFFICKING ENFORCEMENT AND THE CRIMINALIZATION OF MIGRATION

The previous Part explored the ways in which current antitrafficking strategies have the potential to fuel misperceptions concerning migrant criminality. In turn, this discourse justifies restrictionist migration policies and laws that criminalize smuggled migrants. This Part traces out the manifestations of the discourse on the ground. In particular, this Part explores the ways in which antitrafficking efforts have been used to justify a prosecution-centered approach not only to antitrafficking efforts but to all immigration policy.

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See Catherine L. Fisk & Michael J. Wishnie, *Hoffman Plastics Compounds, Inc. v. NLRB: The Rules of the Workplace for Undocumented Immigrants* (describing the tensions between immigration and labor law), in *IMMIGRATION STORIES* 311, 311-12 (David A. Martin & Peter H. Schuck eds., 2005); Ruben J. Garcia, *Toward Fundamental Change for the Protection of Low-Wage Workers: The “Workers’ Rights Are Human Rights” Debate in the Obama Era*, 2009 U. CHI. LEGAL F. 421, 422-24 (arguing that the current labor law statutory scheme is flawed because it divides workers into categories and is “changeable, malleable, and politically contingent”); Saucedo, *supra* note 13, at 893-903 (discussing how recent government activity reinforced immigrant community fears and forced undocumented workers “deeper into the shadows”); Wishnie, *supra* note 90, at 195 (“[T]he prohibition on [undocumented-immigrant] employment . . . in fact has led to increased workplace exploitation of undocumented immigrants, strengthened the ‘jobs magnet’ that sanctions aimed to weaken, encouraged illegal immigration, and eroded wages and working conditions for U.S. workers.”).

<sup>112</sup> See Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 348-49 (discussing ways in which migrants are perceived as criminals and how those perceptions increase support for harsh immigration laws). For information on actual rates of migrant criminality, see Rumbaut et al., *supra* note 98, which finds that immigrants have lower rates of criminal convictions than native-born Americans.

<sup>113</sup> See Hathaway, *supra* note 1, at 34 (“Simply put, the agreement of states to criminalize smuggling and to strengthen border control efforts, coupled with inelastic demand for border crossing by mostly less-than-wealthy persons, will logically create the conditions within which traditionally benign forms of smuggling are transmuted into the clearly rights-abusive practices characteristic of trafficking.”); see also *Pushing the Border Out Hearing*, *supra* note 100, at 40 (statement of John P. Torres) (explaining that ICE’s antitrafficking strategy is to “dismantle the criminal and terrorist organizations that smuggle or traffic in people” and to apply “a vast array of investigative methodologies in the fight against both criminal and terrorist organizations as well as the infrastructure that supports their activities in the United States and around the world”).

An immigration strategy that relies heavily on the criminalization of migrants undercuts antitrafficking goals. Section II.A explores the complex interaction between the increased border enforcement that has been justified in part on antitrafficking grounds and the actual effects of these policies on trafficking. Section II.B explores state and local participation in antitrafficking efforts and explains that while these efforts can bolster federal efforts, they also map onto certain restrictionist policies that are in tension with antitrafficking goals. For this reason, the development of state antitrafficking strategies, like any other antitrafficking effort situated in a broader context of highly restrictionist enforcement efforts, may actually prove to be a mixed blessing for migrant trafficking victims.

#### A. Border Control Policy as Antitrafficking Policy

One of the most consistent themes sounded over the past decade by government officials charged with “homeland security” has been the need to increase “border security.” Although the term was almost never used prior to 2001, “border security” has become a catchphrase that encompasses a range of security-related goals, including immigration control, customs screening of goods and people, and more exacting (usually biometric) document requirements.<sup>114</sup>

Government officials frequently have mentioned antitrafficking efforts within the context of border security.<sup>115</sup> Antitrafficking is generally listed as one of a number of objectives that officials hope to achieve through an increased law enforcement presence at the border. In this sense, trafficking in persons, like drug trafficking or human smuggling, is presented as a problem that exists largely because of insufficient personnel and monitoring along the border.

It is certainly true that some international trafficking occurs like other forms of unauthorized migration: individuals lacking legal authorization to enter the country are transported across the border surreptitiously or using fraudulent documents. To a certain extent, a greater (and better trained) force along the border could stop some trafficking at the international border.

On the other hand, much of the human trafficking that occurs in the contemporary context could easily avert even the most stringently staffed borders. Some victims have legitimate visas that allow them

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<sup>114</sup> See Chacón, *supra* note 4, at 1853-54 (discussing post-September 11 use of the phrase “border security”).

<sup>115</sup> See, e.g., sources cited *supra* note 95.

entry.<sup>116</sup> Others have facially valid but fraudulent visas that have been obtained for them by traffickers.<sup>117</sup> Thus, for some migrants, it is only after they have entered the country that the person responsible for their transportation or their later employment is able to exploit vulnerabilities in their legal and economic status, and the relationship changes to one of trafficking victim and trafficker.<sup>118</sup>

This is significant because solutions to the trafficking problem depend on correctly identifying the nature of that problem. To date, government officials charged with eradicating trafficking have made a number of statements suggesting that they understand the trafficking problem as best solved by attacking criminal smuggling networks. For example, in his remarks at a human trafficking symposium in the fall of 2008, then-Secretary of the Department of Homeland Security Michael Chertoff stated,

Let me be clear about this: the line between so-called voluntary migration and human trafficking is not a very bold line. It is often the case that people who begin the movement across borders in a voluntary way, because they want to come across in order to get work for themselves, quickly turn into victims when they are held for ransom, or when they are required to work off the cost of the smuggling by paying off the vast majority of their wages to smuggling organizations. Therefore, by cracking down on illegal migration, we are actually cracking down on the kind of network activity, which actually facilitates human trafficking and victimization, as well.<sup>119</sup>

Much of this statement is incontrovertible. First, Mr. Chertoff correctly acknowledges that there is no bright line that separates smuggling

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<sup>116</sup> This is the situation of the plaintiffs in the case against Signal International, who held valid H-2B visas but thought that they would be provided with permanent visas and allegedly were exploited by the employer who made those promises. See Julia Preston, *Suit Points to Guest Worker Program Flaws*, N.Y. TIMES, Feb. 2, 2010, at A12. Interestingly, the plaintiffs in the Signal International case also allege that “[i]mmigration authorities worked closely with [the] company . . . to discourage protests by temporary guest workers from India over their job conditions, including advising managers to send some workers back to India.” *Id.*

<sup>117</sup> See LIANA SUN WYLER, ALISON SISKIN & CLARE RIBANDO SEELKE, CONG. RES. SERV., *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 5* (2009) (explaining how traffickers use false documents to transport women lured by false promises of jobs, study, or travel opportunities).

<sup>118</sup> See *id.* (“After providing transportation and false documents to get victims to their destination, [traffickers] subsequently charge exorbitant fees for those services, often creating life-time debt bondage.”).

<sup>119</sup> Michael Chertoff, Sec’y, Dep’t of Homeland Sec., Remarks at the Stop Human Trafficking Symposium (Sept. 9, 2008), available at [http://www.dhs.gov/xnews/speeches/sp\\_1221053062406.shtm](http://www.dhs.gov/xnews/speeches/sp_1221053062406.shtm).

from trafficking. Instead, situations involving smuggled migrants are fluid and can change to trafficking over time, depending on circumstances. Second, his remarks pinpoint the fact that unauthorized or smuggled migrants suffer from legal and economic vulnerabilities that render them susceptible to trafficking. Third, he notes that some of the players involved in smuggling migrants are also involved in trafficking—a statement that is undoubtedly true in some cases, although Mr. Chertoff makes no effort to make a precise statement as to the degree of overlap. He merely notes that these individuals use the same “kind of network activity.” Finally, he states that the large debts that migrants frequently accrue to their smugglers put smuggling networks in a position to exploit smuggled migrants through debt bondage. Unfortunately, while the statement recognizes the nuanced nature of the trafficking problem, the proposed solution is not equally nuanced. In the end, the Secretary proposes “cracking down on illegal migration.”<sup>120</sup>

Efforts to “crack down on illegal migration” have been on a rapid rise since the mid-1990s. Over the past six years—and on the watch of administrations from two different political parties—immigration enforcement has ballooned.<sup>121</sup> Government spending on border enforcement and interior enforcement is at its highest level in history. The number of individuals formally removed each year reached a record high in 2009, and the current Administration is on course to set yet another record this year.<sup>122</sup>

The government is also prosecuting more immigration offenses than ever before.<sup>123</sup> Indeed, immigration crimes now make up half of the federal criminal docket<sup>124</sup>—the vast majority of these offenses are unlawful entry and, to a lesser extent, felony reentry.<sup>125</sup> Smuggling

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<sup>120</sup> *Id.*

<sup>121</sup> See Jennifer M. Chacón, *A Diversion of Attention?: Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1565-66 (2010) (“Never before in the history of the United States has the government removed so many noncitizens in so short a time frame.”).

<sup>122</sup> *Id.*

<sup>123</sup> See Chacón, *supra* note 5, at 139 (“After remaining relatively flat in the period from 1986 to 1996, the number of immigration prosecutions almost quadrupled over the next ten years.”).

<sup>124</sup> See Schwartz, *supra* note 7 (reporting a nearly nine-percent increase in federal immigration prosecutions in fiscal year 2009 from previous years); see also TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, FY 2009 FEDERAL PROSECUTIONS SHARPLY HIGHER (2009), <http://trac.syr.edu/tracreports/crim/223> (indicating that, in fiscal year 2009, immigration prosecutions comprised fifty-four percent of all federal filings).

<sup>125</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION PROSECUTIONS AT RECORD LEVELS IN FY 2009 (2009), <http://trac.syr.edu/immigration/>

and trafficking prosecutions are a miniscule subset of total prosecutions.<sup>126</sup> Trafficking offenses do not even make the list of the top ten categories of immigration prosecutions.<sup>127</sup>

If “cracking down on illegal migration” truly reduces trafficking, as Secretary Chertoff’s remarks suggest,<sup>128</sup> then the increase in removals and prosecutions discussed above would be an effective means of reducing trafficking. For a variety of reasons, however, it is unlikely that such a direct line between immigration enforcement and trafficking eradication exists.

Indeed, in some ways, the efforts to “crack down on illegal migration” might actually facilitate trafficking. First, efforts to crack down on illegal migration in the workplace have left undocumented migrants more—not less—vulnerable to exploitation.<sup>129</sup> Second, efforts to prosecute large numbers of first-time illegal entrants have overwhelmed resources along the southern border, diverting law enforcement resources from more serious crimes—including trafficking—in favor of securing thousands of easy plea convictions.<sup>130</sup>

Third, because increased border enforcement has not stopped the flow of unauthorized migration but has simply made it more difficult and more costly, these efforts have exacerbated the dynamic, identified by Secretary Chertoff in his speech,<sup>131</sup> whereby smugglers exploit the migrants who have made contractual arrangements with them. One thing that seems clear about recent border-enforcement efforts is that they have made cross-border movement more difficult, and consequently, more costly.<sup>132</sup> Presumably, people are more likely to turn

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reports/218 (providing a summary of data on immigration prosecutions from the first nine months of fiscal year 2009).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Chertoff, *supra* note 119.

<sup>129</sup> *See, e.g.*, Saucedo, *supra* note 13, at 892 (providing an overview of the U visa and its implications for undocumented workers); *see also* Chacón, *supra* note 10, at 2980 (suggesting that the TVPA’s exclusion of a broad range of labor exploitation from its reach exacerbates workplace exploitation).

<sup>130</sup> *See, e.g.*, JOANNA LYDGATE, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 1-3 (2010), [http://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf) (analyzing the effectiveness of Operation Streamline, a program that “requires the federal criminal prosecution and imprisonment of all unlawful border crossers,” as a border-security measure).

<sup>131</sup> Chertoff, *supra* note 119.

<sup>132</sup> *See* Andreas, *supra* note 4, at 116 (noting that the increased risks of crossing the border have led to a rise in the price of being smuggled); Khalid Koser, *Why Migrant*



to professionals—smugglers—to assist them in crossing the border.<sup>133</sup> Smuggled migrants are now more likely to owe money to their smugglers and more likely to try to pay off this debt with labor after entry.<sup>134</sup> This increases the chances that smuggling relationships will transform into trafficking relationships.<sup>135</sup> And once an individual is in a situation in which her labor is exploited, her legal vulnerability is exacerbated by contemporary policies that criminalize migrants.

If such individuals could be comfortable knowing that they would be identified as trafficking victims and offered legal and social protection, such exploitation would not persist. But these individuals fall within a gray area in which they are more likely to be identified as “illegal aliens” than “trafficking victims.” Given the current “crackdown” on “illegal immigrants,” it is not at all surprising that such individuals would be very much afraid to seek official or unofficial assistance.<sup>136</sup> In short, although the Secretary may be right that smugglers and traffickers rely on the same networks, it does not necessarily follow that “cracking down” on unauthorized migrants is the best way to combat the trafficking problem.

Genuine efforts to address trafficking should focus at least as much attention on workplace conditions as on smuggling networks,

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*Smuggling Pays*, INT'L MIGRATION, June 2008, at 3 (providing data on the financing of smuggling in Afghanistan and Pakistan).

<sup>133</sup> See David Kyle & Rey Koslowski, *Introduction* to GLOBAL HUMAN SMUGGLING, *supra* note 4, at 1, 22; Raimo Väyrynen, *Illegal Immigration, Human Trafficking, and Organized Crime* 2-7, 20 (World Inst. for Dev. Econ. Research, Discussion Paper No. 2003/72, 2003), available at [http://www.wider.unu.edu/publications/working-papers/discussion-papers/2003/en\\_GB/dp2003-072/files/78091733799863273/default/dp2003-072.pdf](http://www.wider.unu.edu/publications/working-papers/discussion-papers/2003/en_GB/dp2003-072/files/78091733799863273/default/dp2003-072.pdf) (“To be able to cross the border, illegal immigrants may need the help of professional smugglers and their assistants.”). Hathaway laments the lack of good data on this point. See Hathaway, *supra* note 1, at 32 n.187 (“There is, however, a paucity of hard data to show a clear correlation between heightened border controls and increased human smuggling and/or trafficking.”).

<sup>134</sup> See, e.g., Guido Friebel & Sergei Guriev, *Smuggling Humans: A Theory of Debt-Financed Migration*, 4 J. EUR. ECON. ASS'N 1085, 1107-08 (2006) (noting that increased border protection leads to increased debt-financed migration, even where overall unauthorized migration decreases).

<sup>135</sup> See Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 285 (2000) (noting that trafficked persons consent to migration with little knowledge of the potential coercive post-migration situation); David A. Feingold, *Human Trafficking*, FOREIGN POL'Y, Sept.–Oct. 2005, at 26, 27 (arguing that some measures designed to protect women might make them more vulnerable to traffickers); Hathaway, *supra* note 1, at 33-34 (“[D]esperate people determined to migrate will need smugglers more than ever.”).

<sup>136</sup> For a discussion of the ways in which government enforcement efforts fuel migrant fear, see Saucedo, *supra* note 13, and *supra* note 12 and accompanying text.

and should target the employers of unauthorized workers more heavily than it targets the workers. That has not been the nature of the U.S. crackdown on unauthorized migration. Workplace raids have led to the massive removal of workers in many more cases than they have resulted in the prosecution of those who exploit migrant laborers.<sup>137</sup> As such, it seems just as likely that the crackdown will fuel some trafficking even as it eradicates certain instances of it through the targeting and prosecution of some smuggling networks.

If the relationship between immigration enforcement and anti-trafficking efforts is so complex, why is the former so often cited as a direct means to the latter? Certainly, there is an appealing superficial logic to the claims. Furthermore, the ability to invoke the plight of the unfortunate trafficking victim to justify immigration enforcement puts a human face on both sides of an equation that otherwise seems to pit the economically disadvantaged migrant against the large and unsympathetic state. The invocation of trafficking as a driving force behind immigration enforcement puts a human rights gloss on a border-enforcement model that, in fact, raises a number of serious human rights concerns.<sup>138</sup> It is the very weakening of the human rights orientation of migration policy—such as the erosion of refugee protections—that increases the market for international trafficking. But these connections are elided by policy statements that emphasize an equation where more enforcement means less trafficking.

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<sup>137</sup> See Saucedo, *supra* note 13, at 896-98 (describing the effect of ICE raids on workplaces); see also Wishnie, *supra* note 90, at 195 (arguing that the “employer sanctions regime” has resulted in increased exploitation of immigrant workers); Spencer S. Hsu, *For the Record: Immigration*, WASH. POST, Jan. 29, 2008, at A13 (“While federal immigration authorities arrested nearly four times as many people at workplaces in 2007 as they did in 2005[,] . . . [o]nly 92 owners, supervisors or hiring officials were arrested in an economy that includes 6 million companies that employ more than 7 million unauthorized workers.”), in William Branigin, *Sebelius Conciliatory in Democrats’ Response to Bush Address*, WASH. POST, Jan. 29, 2008, at A13. The large Agriprocessors, Inc. raid is a case in point. Although about 300 noncitizens were arrested and removed in those raids, the owner of the plant ultimately did not face prosecution on any immigration-related charges. See *Iowa: Immigration Charges Dropped in Raid Case*, N.Y. TIMES, Nov. 19, 2009, at A20.

<sup>138</sup> See KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 87-130 (2007) (detailing the undesirable and immoral consequences of restrictive immigration policy); see also Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401, 1440 (2007) (noting the “brutality inherent in enforcement of the current immigration controls, which result in physical abuse, promote racial discrimination, and relegate certain groups of U.S. citizens and lawful immigrants to second-class status,” as well as the “[r]ampant civil rights deprivations [that] have resulted,” and concluding that “[s]uch consequences render U.S. immigration enforcement immoral”).

Interestingly, the same sort of pattern appears at the state level, where some state legislatures have enacted antitrafficking legislation not as part of a trend toward greater human rights protections for migrants but rather as part of a trend toward more state participation in the regulation and criminalization of unauthorized migration.

B. *State and Local Immigration Enforcement Through Antitrafficking Policy?*

State and local participation in immigration regulation and enforcement has been constrained by Supreme Court doctrine, dating from the late nineteenth century,<sup>139</sup> which declared that immigration control is a responsibility exclusively held by the federal government.<sup>140</sup> Courts have frequently struck down state efforts to regulate immigration law<sup>141</sup> and have subjected states' efforts to distinguish among state residents on the basis of alienage to heightened scrutiny,<sup>142</sup> as opposed to the rational basis review applied to federal alienage distinctions.<sup>143</sup> Nevertheless, states' efforts to develop immigration regulations have sometimes withstood court scrutiny in cases where courts have found that a state's efforts to regulate immigration complement the federal statutory scheme.<sup>144</sup>

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<sup>139</sup> Until the late nineteenth century, the states played a relatively active role in shaping and enforcing migration policy. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 23 (1996) (discussing state policies of banishment and conditional pardons as precursors of the federal deportation mechanism); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 2-3 (2006) (arguing that the United States had an active immigration policy prior to the nineteenth century but that it was shaped by the states).

<sup>140</sup> See *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.").

<sup>141</sup> See, e.g., *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 554-55 (M.D. Pa. 2007) (striking down as unconstitutional a set of ordinances passed in the city of Hazleton, Pennsylvania, to restrict benefits and services available to noncitizens); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995) (striking down much of Proposition 187, an initiative passed by California voters in 1994, which sought to restrict benefits available to noncitizens).

<sup>142</sup> See *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding that state statutes denying welfare benefits to residents violate the Equal Protection Clause); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) ("State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States . . . have accordingly been held invalid.").

<sup>143</sup> See *Matthews v. Diaz*, 426 U.S. 67, 69 (1976) (upholding federal legislation conditioning an alien's Medicare participation on her length of residency).

<sup>144</sup> See, e.g., *De Canas*, 424 U.S. at 357-58 (declining to invalidate a California Labor Code provision prohibiting employers from knowingly employing an unauthorized noncitizen worker where the provision was consistent with the comprehensive federal

Recently, state and local governments have developed a cottage industry in direct and indirect immigration law enforcement. Over the past five years, state and local initiatives aimed at regulating immigration have proliferated throughout the United States.<sup>145</sup> These initiatives have included, among other things, criminal and civil penalties and contracting prohibitions upon employers who employ unauthorized migrant workers;<sup>146</sup> penalties upon landlords who rent housing

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statutory scheme for regulation of immigration and naturalization). More recently, the Ninth Circuit upheld an Arizona immigration law targeting the employment of unauthorized noncitizen workers. See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866-67 (9th Cir. 2009) (upholding an Arizona statute that required employers to use the federal government's electronic verification system for checking employees' work authorization status, even though the federal law makes use of the system voluntary).

<sup>145</sup> See NAT'L CONFERENCE OF STATE LEGISLATURES, IMMIGRANT POLY PROJECT, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION IN 2008, at 1 (2009), available at <http://www.ncsl.org/portals/1/documents/immig/stateImmigReportFinal2008.pdf> (noting that, in 2008, state legislatures considered at least 1305 immigration-related laws); Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1 ("[M]ore than 30 towns nationwide have enacted laws intended to address problems attributed to illegal immigration . . ."). Scholarly discussions of these laws have abounded in recent years. See, e.g., Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 580-81 (2009) (describing Arkansas's anti-immigration laws as a "microcosm of the various states across the country where state and local officials are coping with the recent expansion of legal and unauthorized immigration"); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 31 (noting the "torrent of state legislation" related to immigration); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1118-19 (2009) (discussing increased state involvement in immigration laws); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 569 (2008) (noting the "regulatory trend[]" of increased state participation in immigration lawmaking); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1559-60 (2008) (recognizing a "veritable deluge" of new state and local immigration laws); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1622 (2008) (discussing the increased interest of local governments in immigration laws).

<sup>146</sup> See, e.g., Legal Arizona Workers Act § 6, ARIZ. REV. STAT. ANN. § 23-214 (Supp. 2008) (mandating employer participation in the federal E-Verify program); ARK. CODE ANN. § 19-11-105(b) (2007) ("No state agency may enter into or renew a public contract for services with a contractor who knows that the contractor or a subcontractor employs or contracts with an illegal immigrant to perform work under the contract."); Hazleton, Pa., Ordinance 2006-18 (Sept. 8, 2006) (prohibiting businesses from hiring unauthorized migrants), *invalidated by Lozano*, 496 F. Supp. 2d 477; Bruce Lambert, *Congressman Endorses Suffolk County Plan to Bar Contractors from Using Illegal Immigrants*, N.Y. TIMES, Aug. 17, 2006, at B3 (describing a Suffolk County, New York, bill to impose restrictions on county contractors). The Suffolk County bill was passed into law in October. See *Hauptpauge: New Immigration Law*, N.Y. TIMES, Oct. 5, 2006, at B7 (reporting that the Suffolk County executive signed the bill into law).

to unauthorized migrants;<sup>147</sup> English-only ordinances;<sup>148</sup> and efforts to strip unauthorized migrants of public benefits.<sup>149</sup> Many states have also enacted criminal laws that mirror the federal government's own prohibitions on immigration-related crimes such as harboring unauthorized migrants, using false proof of citizenship, and trafficking.<sup>150</sup> Some municipalities have even adopted their own policies targeting the undocumented, such as the Waukegan, Illinois, policy of automatically impounding cars that belong to undocumented noncitizens.<sup>151</sup> One significant subset of these ordinances criminalizes conduct that state and local legislators associated—whether correctly or incorrectly—with unauthorized migration. Such ordinances include the laws that prohibit congregating in certain areas and soliciting employ-

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<sup>147</sup> See, e.g., Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006) (subjecting landlords that rent to unauthorized migrants to fines and imprisonment), *permanently enjoined by* *Garrett v. City of Escondido*, No. 06-2434 (S.D. Cal. Dec. 15, 2006); Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006) (requiring tenants to show proof of legal citizenship or residency to obtain the occupancy permits necessary for landlords to avoid criminal prosecution). For the basis upon which the Escondido ordinance was originally enjoined, see *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1055-56, 1059 (S.D. Cal. 2006), in which the court granted a temporary restraining order against the ordinance based, in part, on the likelihood of preemption by the “harboring” provisions of 8 U.S.C. § 1324 (2006).

<sup>148</sup> See Hazleton, Pa., Ordinance 2006-19 (Sept. 8, 2006) (declaring that English is the official language of Hazleton), *invalidated by* *Lozano*, 496 F. Supp. 2d 477; see also Pham, *supra* note 145, at 1148 (noting that laws aimed at restricting the rights and benefits of noncitizens are “[o]ften . . . passed together with English-only ordinances”); cf. Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT’L L. 453, 518-19 (2008) (observing the anti-Latino bias of English-only legislation); Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 307-11 (2009) (noting the recent wave of English-only ordinances and discussing linkages between English-only laws promoting racial oppression and racial violence against Latinos).

<sup>149</sup> See Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 101-03 (2008) (discussing state laws and policies that deny undocumented students in-state tuition rates at public universities). Efforts to deny public benefits to noncitizens have a rich history, which is neatly embodied in the 1990s struggle over California’s Proposition 187. See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 238 (2003).

<sup>150</sup> See Olivas, *supra* note 149, at 101-02 (discussing laws in Georgia, Arizona, and Hazleton, Pennsylvania); Stumpf, *supra* note 145, at 1598-99 (discussing examples from Oklahoma, California, Oregon, and Wyoming). See *infra* note 164 for a list of state antitrafficking legislation.

<sup>151</sup> See Catharine Slack, *Municipal Targeting of Undocumented Immigrants’ Travel in the Post 9/11 Suburbs: Waukegan, Illinois Case Study*, 22 GEO. IMMIGR. L.J. 485, 488-91 (2008) (describing Waukegan’s ordinance requiring that undocumented immigrants’ cars be towed).

ment.<sup>152</sup> These laws take aim at “day laborers” and rest on the problematic assumption that all day laborers are unauthorized workers.<sup>153</sup>

Scholars have split on the question of the constitutionality,<sup>154</sup> not to mention the desirability,<sup>155</sup> of state and local immigration regulation. Courts also have reached divergent conclusions on the constitutionality of such state and local immigration-related ordinances. Some courts have concluded that these ordinances impermissibly encroach upon the field of immigration, which is to be occupied solely by the federal government.<sup>156</sup> Other courts have struck down certain ordinances on the more limited grounds that they are inconsistent

<sup>152</sup> See, e.g., Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 490-95 (2005–2006) (discussing such ordinances in Redondo Beach and Los Angeles); Press Release, Mexican Am. Legal Def. & Educ. Fund, MALDEF, ACLU/SC and NDLOJ File Lawsuit Challenging City of Costa Mesa’s Anti-Solicitation Ordinance (Feb. 2, 2010), available at [http://maldef.org/news/releases/maldef\\_aclusc\\_and\\_ndlon\\_file\\_02022010](http://maldef.org/news/releases/maldef_aclusc_and_ndlon_file_02022010) (discussing lawsuit against antisolicitation ordinance aimed at day laborers, among others); see also Cent. Am. Refugee Ctr. v. City of Glen Cove, 753 F. Supp. 437, 439-42 (E.D.N.Y. 1990) (upholding against equal protection and First Amendment challenges local antisolicitation ordinances that prevented day laborers from congregating).

<sup>153</sup> See Robin Finn, *Town Divides over Law Aimed at Day Laborers*, N.Y. TIMES, Dec. 27, 2009, at NJ1 (describing a day-laborer law in Oyster Bay, New York); see also Lopez v. Town of Cave Creek, Ariz., 559 F. Supp. 2d 1030, 1035-36 (D. Ariz. 2008) (granting a preliminary injunction against a Cave Creek ordinance aimed at day-laborer solicitation); Order Denying Motion to Suppress and Motion to Terminate Removal Proceedings, *In re Sanchez*, File No. 98-300-503, at 6 (Dep’t of Justice Immig. Ct. Jan. 31, 2008) (“[T]he solicitation of day labor in our current culture has a strong correlation to undocumented presence in the United States and lack of employment authorization.”).

<sup>154</sup> Compare Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) (challenging the traditional belief that there is a “constitutional mandate for federal exclusivity over pure immigration law”), with Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 987 (2004) (stating that the Framers intended for power over immigration to be “exclusively federal”), and Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 530-58 (2001) (“[I]mmigration power is an exclusively federal power which Congress may not, by statute, devolve to the states.”).

<sup>155</sup> Compare Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005) (contending that assistance from local police can lead to successful immigration law enforcement), and Rodríguez, *supra* note 145, at 593-94 (discussing why local communities think passing local immigration laws is beneficial), with Pham, *supra* note 154, at 981-86 (describing problems that arise from local involvement in immigration laws), and Wishnie, *supra* note 154, at 567 (noting the “desirability of preserving the vitality of the equality norms that have for over a century shielded noncitizens from state and local bigotry”).

<sup>156</sup> See, e.g., League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995) (holding that the sections of Proposition 187 that occupied the immigration field controlled by federal law are preempted).

with existing federal statutes regulating immigration.<sup>157</sup> Still other courts have upheld state and local ordinances, finding these schemes in harmony with federal efforts to regulate immigration.<sup>158</sup> Where criminal law is concerned, because states and localities—rather than the federal government—have historically served as the locus of criminal regulation,<sup>159</sup> federal courts have sometimes been surprisingly willing to defer to such local regulation of crime.<sup>160</sup>

State and local ordinances aimed at managing migration raise important concerns about the rights of immigrant communities. These ordinances put state and local law enforcement agents in the business of policing immigration as part of their core mission.<sup>161</sup> Because removal is often a possible sanction for noncitizens arrested in the course of enforcing these laws, the procedural gap between the rights and remedies available to noncitizens in civil (as opposed to criminal) immigration proceedings may create a situation in which local law enforcement agents funnel noncitizens into the civil removal system to avoid possible sanctions—such as suppression or disciplinary actions—that might result if the same matter is brought in criminal courts.<sup>162</sup> More aggressive policing of immigrant communities may result.<sup>163</sup>

Over the past six years, almost every state has enacted antitrafficking legislation.<sup>164</sup> This flurry of state legislation is, in part, a reflection

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<sup>157</sup> See, e.g., *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 879 (N.D. Tex. 2008) (“Because Farmers Branch has attempted to regulate immigration differently from the federal government, the Ordinance is preempted by the Supremacy Clause.”); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 554-55 (M.D. Pa. 2007) (concluding that Hazleton may not “disrupt a carefully drawn federal statutory scheme”).

<sup>158</sup> See, e.g., *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866-67 (9th Cir. 2009) (holding that Arizona’s E-Verify requirement for employers was not preempted because it accorded with congressional intent).

<sup>159</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 261 (1993) (“Before the twentieth century, criminal justice was overwhelmingly the business of the states, not the federal government.”).

<sup>160</sup> See Stumpf, *supra* note 145, at 1587, 1608 (noting the phenomenon and arguing that such deference is undesirable when the goal of the criminal statute is to enforce immigration law indirectly).

<sup>161</sup> See Chacón, *supra* note 121, at 1579-92.

<sup>162</sup> See *id.* at 1598-1615.

<sup>163</sup> See *id.* at 1615-19.

<sup>164</sup> As of August 2009, forty-three states had enacted criminal and civil laws targeting human trafficking. Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 87 (2009); see also ALASKA STAT. § 11.41.360 (2008) (enacted 2006) (criminalizing sex and labor trafficking); ARIZ. REV. STAT. ANN. § 13-1307 (Supp. 2008) (enacted 2005) (criminalizing sex trafficking); *id.* § 13-1308 (enacted 2005) (criminalizing labor trafficking); ARK.

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CODE ANN. § 5-11-108 (2006) (enacted 2005) (criminalizing trafficking); CAL. CIV. CODE § 52.5 (West 2008) (creating a private right of action for human trafficking victims); CAL. PENAL CODE § 236.1 (West 2008 & Supp. 2009) (criminalizing trafficking); *id.* § 236.2 (providing additional protection for trafficking victims); *id.* § 236.5 (describing law enforcement obligations to identify victims of human trafficking); *id.* § 266k (providing programming for child victims); *id.* § 273.7 (penalizing disclosure of the location of a trafficking shelter); *id.* § 293 (forbidding law enforcement agents from disclosing the personal information of trafficking victims); COLO. REV. STAT. § 18-6-402 (2008) (enacted 1977) (criminalizing child trafficking); *id.* § 18-13-127 (enacted 2006) (criminalizing trafficking in adults); CONN. GEN. STAT. ANN. § 52-571i (West 2007 & Supp. 2009) (enacted 2006) (creating a civil private cause of action); *id.* § 53a-192a (enacted 2006) (criminalizing trafficking); DEL. CODE ANN. tit. 11, § 787 (2007) (enacted 2007) (criminalizing trafficking); FLA. STAT. ANN. § 772.104 (West 2007) (creating a private right of action for trafficking victims); *id.* § 787.05 (West 2007) (enacted 2004) (criminalizing forced labor); *id.* § 787.06 (finding human trafficking to be a “modern day” form of slavery); *id.* § 16-5-46 (enacted 2006) (criminalizing trafficking); IDAHO CODE ANN. § 18-8602 (Supp. 2008) (enacted 2006) (defining human trafficking); *id.* § 18-8603 (criminalizing human trafficking); 720 ILL. COMP. STAT. 5/10-9 (2010) (enacted 2009) (criminalizing trafficking); IND. CODE ANN. § 35-42-3.5-1 (West Supp. 2008) (enacted 2006) (criminalizing trafficking); *id.* § 35-42-3.5-2 (enacted 2006) (providing that a court may order that restitution be paid to a victim of trafficking); *id.* § 35-42-3.5-3 (enacted 2006) (creating a civil private right of action); IOWA CODE ANN. §§ 710A.1–.5 (West Supp. 2009) (enacted 2006) (defining trafficking and providing restitution for victims and an affirmative defense for alleged perpetrators); *id.* § 915.51 (enacted 2006) (providing protection of victims regardless of immigration status); KAN. STAT. ANN. § 21-3446 (2007) (enacted 2005) (criminalizing trafficking); *id.* § 21-3447 (enacted 2005) (criminalizing aggravated trafficking); KY. REV. STAT. ANN. § 529.100 (LexisNexis 2008) (enacted 2007) (criminalizing trafficking); *id.* § 529.110 (enacted 2007) (criminalizing “promoting human trafficking”); LA. REV. STAT. ANN. § 14:46.2 (2007) (criminalizing trafficking); ME. REV. STAT. ANN. tit. 5, § 4701 (Supp. 2008) (enacted 2007) (defining and criminalizing human trafficking and creating a civil private right of action); MD. CODE ANN. CRIM. LAW § 11-303 (LexisNexis Supp. 2008) (enacted 2007) (criminalizing trafficking); MICH. COMP. LAWS ANN. §§ 750.462b–.462i (West Supp. 2009) (enacted 2006) (criminalizing trafficking); MINN. STAT. ANN. §§ 609.281–.283 (West 2009) (enacted 2005) (criminalizing trafficking); *id.* § 609.284 (enacted 2005) (creating civil liability for trafficking); *id.* §§ 609.321–.322 (amended 2005 to include sex trafficking) (including sex trafficking in a statute penalizing prostitution); MISS. CODE ANN. §§ 97-3-54 to -54.4 (West Supp. 2008) (enacted 2006) (criminalizing trafficking); MO. ANN. STAT. § 566.206 (West Supp. 2009) (enacted 2004) (criminalizing trafficking); *id.* § 566.209 (enacted 2004) (criminalizing sex trafficking); MO. ANN. STAT. §§ 566.212–.213 (West Supp. 2009) (enacted 2004) (criminalizing child sex trafficking); MONT. CODE ANN. § 45-5-306 (2007) (enacted 2007) (criminalizing trafficking); NEB. REV. STAT. §§ 28-830 to -832 (2008) (enacted 2006) (criminalizing trafficking); NEV. REV. STAT. ANN. §§ 200.467–.468 (LexisNexis Supp. 2007) (enacted 2007) (criminalizing trafficking); N.H. REV. STAT. ANN. §§ 633:6–:10 (2010) (enacted 2009) (criminalizing trafficking and establishing penalties); N.J. STAT. ANN. § 2C:13-8 (West 2005 & Supp. 2009) (enacted 2005) (criminalizing trafficking); N.M. STAT. ANN. § 30-52-1 (LexisNexis 2009) (enacted 2008) (criminalizing trafficking); N.Y. PENAL LAW § 135.35 (McKinney 2009) (enacted 2007) (defining labor trafficking); *id.* § 230.34 (enacted 2007) (criminalizing sex trafficking); N.C. GEN. STAT. §§ 14-43.10–.13 (2007) (enacted 2006) (defining and criminalizing labor and sex trafficking); N.D. CENT. CODE §§ 12.1-40-01 to -02 (2010)



of the positive antitrafficking activism spurred at both the international and domestic level by the Palermo Protocol and the TVPA. But the bills were also affected by the anti-immigrant climate in which many of them were passed.<sup>165</sup> Consequently, the bills some state legislatures passed address trafficking only as part of a broader effort to insert state law enforcement and other regulators into the business of punishing migrants and regulating migration.<sup>166</sup>

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(enacted 2009) (defining and criminalizing trafficking); OKLA. STAT. ANN. tit. 21, § 748 (West Supp. 2009) (enacted 2008) (criminalizing trafficking); *id.* tit. 21, § 748.2 (enacted 2008) (creating guidelines for human trafficking victims); OR. REV. STAT. § 30.867 (2007) (enacted 2007) (creating a civil private right of action for trafficking victims); *id.* § 163.266 (enacted 2007) (criminalizing trafficking); 18 PA. CONS. STAT. §§ 3001–3004 (Supp. 2008) (enacted 2006) (criminalizing trafficking and authorizing restitution and forfeiture); R.I. GEN. LAWS §§ 11-67-1 to -5 (LexisNexis Supp. 2008) (enacted 2007) (criminalizing trafficking and authorizing restitution and forfeiture); S.C. CODE ANN. § 16-3-930 (West Supp. 2008) (enacted 2006) (criminalizing trafficking); TENN. CODE ANN. §§ 39-13-307 to -311 (2009) (enacted 2008) (criminalizing trafficking and providing restitution); TEX. CIV. PRAC. & REM. CODE ANN. §§ 98.001–.006 (Vernon Supp. 2009) (enacted 2009) (creating civil remedies for trafficking); TEX. GOV'T CODE ANN. § 402.035 (Vernon Supp. 2009) (enacted 2009) (creating a human trafficking prevention task force); TEX. PENAL CODE ANN. §§ 20A.01–.02 (Vernon Supp. 2009) (enacted 2003) (criminalizing trafficking); UTAH CODE ANN. §§ 76-5-307 to -310 (2008) (enacted 2008) (criminalizing trafficking); WASH. REV. CODE ANN. § 7.68.350 (West 2009) (enacted 2003) (creating a task force against human trafficking); *id.* § 7.68.360 (enacted 2005) (mandating coordination of state agency protocols); *id.* § 9A.40.100 (enacted 2003) (criminalizing trafficking); *id.* § 19.320.020 (enacted 2009) (requiring disclosure to foreign laborers regarding working conditions and legal entitlements); *id.* § 19.320.030 (enacted 2009) (creating jurisdiction over international recruitment agents); WIS. STAT. ANN. § 940.302 (West Supp. 2008) (enacted 2007) (criminalizing trafficking); *id.* § 948.051 (enacted 2007) (criminalizing child trafficking).

<sup>165</sup> See, e.g., George A. Martínez, *Immigration: Deportation and the Pseudo-Science of Unassimilable Peoples*, 61 SMU L. REV. 7, 8 (2008) (detailing local efforts to enforce deportation on the basis of federal laws); Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 3-4 (2007) (chronicling local ordinances that discriminate against immigrants); Olivas, *supra* note 145, at 32 (discussing “restrictionist” anti-immigration state statutes); Huyen Pham, *Problems Facing the First Generation of Local Immigration Laws*, 36 HOFSTRA L. REV. 1303, 1303 (2008) (citing a Colorado law that required proof of immigration status before receiving benefits).

<sup>166</sup> See, e.g., Georgia Security and Immigration Compliance Act, 2006 GA. LAWS 105 (codified as amended in scattered sections of 13, 16, 35, 42, 43, 48 & 50 GA. CODE ANN.) (enacting antitrafficking laws as part of a very restrictive immigration bill); 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”); see also MO. ANN. STAT. § 577.675 (West Supp. 2009) (enacted 2008) (criminalizing the “trafficking” of “any illegal alien who is not lawfully present,” suggesting that the law may function chiefly as an antismuggling provision in cases involving noncitizens). In Maricopa County, Arizona, Sheriff Joe Arpaio, who has been engaged in a controversial law en-

At the moment, there is very little evidence regarding how these laws will be deployed in the forty-eight states where they have been enacted.<sup>167</sup> Some states, like California, seem interested in expanding their laws to help migrants by protecting victims regardless of citizenship status and spotlighting exploitative labor practices.<sup>168</sup> In other states, antitrafficking measures have passed in forms that suggest that officials' true concern is to provide law enforcement with additional tools to curb unauthorized migration. For the reasons discussed above, it is tremendously important to bring pressure to bear to ensure that state law enforcement agencies use their antitrafficking laws to curb exploitation rather than to promote the criminalization of immigration.

### CONCLUSION

A vast number of the world's citizens are displaced as a result of poverty, lack of opportunity, the ravages of armed conflict, or the dangers of political repression. This population is particularly vulnerable to exploitation by those who help them to cross international borders, as well as those in whose care or employment they find themselves upon arrival on the other side of the border.

The legal tools states use to manage migration across state borders increase this marginalization. Unless a person can establish her qualifications as a refugee or fit the narrow criteria for legal entrants, she undertakes border crossing in violation of the law and is then confronted with the harsh penalties that states increasingly attach to violations of their border-control measures. Traffickers know this. They take advantage of the legal and social marginalization of migrants in order to profit from their exploitation. This harm is different from the harms created by the smuggler; though he certainly profits from violations of state sovereignty, he also extracts a price from the migrant that does not rise to the level of enslavement, indentured servitude, forced prostitution, or debt bondage. The line is not always

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forcement "crusade" against illegal immigration for the past few years, has posted signs on official vehicles that read, "Help Sheriff Joe Arpaio fight illegal immigration and trafficking. Call 602.876.4154 with any info/tips on illegal aliens." Terry Carter, *The Maricopa County Courthouse War*, A.B.A.J., Apr. 2010, at 42, 46-47.

<sup>167</sup> See *supra* notes 92-93 (describing the relatively scant case law under state anti-trafficking laws to date).

<sup>168</sup> On September 8, 2009, Governor Schwarzenegger signed into law a bill that requires law enforcement agents to identify trafficking victims diligently regardless of citizenship. The bill also expands privacy protections for trafficking victims by allowing them to request that their names be kept out of the public records. CAL. GOV'T CODE § 6254 (West 2008); CAL. PENAL CODE §§ 236.2, 293 (West Supp. 2009).

clear, but where exploitation permeates the relationship between the smuggler and the smuggled, or between the migrant and her employer, the line is undoubtedly crossed.

The TVPA provides one tool to address the needs of those who have been preyed upon by those who cross the line. Overall, that tool has been useful. Like the benefits of U.S. refugee and asylum law,<sup>169</sup> it does not help all who technically qualify for assistance. Only those victims of trafficking who are in the United States are able to avail themselves of the protections and benefits of the TVPA. Moreover, for such individuals, this protection is only provided if the state deems their conditions to be sufficiently exploitative to rise to the level of “severe” forms of trafficking. Even then, it is only granted if the person complies with the demands of the legal system or presents a reason for noncompliance. In short, it is not a broadly available remedy.

Individuals who come forward under the current system to claim protection as victims of trafficking face the real possibility that the government will not find them eligible for such protection.<sup>170</sup> Yet, without protection, those individuals will be subject to deportation—the clear prerogative of the state enforcing its immigration and other criminal laws. The victim in the gray area faces a hard choice.

There are at least two options to improve the plight of the migrant in the gray area. The first is to expand the legal understanding of the kinds of coercive situations that constitute trafficking to encompass more of the exploitative situations that migrants face in an era of unprecedented immigration enforcement. The danger of this approach is that it is likely to prove unpopular with policymakers who seek to decrease incentives for illegal migration. Such lawmakers have criti-

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<sup>169</sup> The President is authorized to set an annual cap for the admission of overseas refugees. 8 U.S.C. § 1157 (2006). Although the United Nations High Commissioner for Refugees estimates that, in 2008, there were 15.2 million refugees worldwide, only about 60,000 of those refugees were resettled in the United States that year. UNITED NATIONS REFUGEE AGENCY, 2008 GLOBAL TRENDS: REFUGEES, ASYLUM-SEEKERS, RETURNNEES, INTERNALLY DISPLACED AND STATELESS PEOPLE 2, 12 (2009), *available at* <http://www.unhcr.org/4a375c426.html>. Political asylum is also available to refugees who are “physically present in the United States,” 8 U.S.C. § 1158, but this form of relief was granted only to about 22,000 more individuals in 2008. DANIEL C. MARTIN & MICHAEL HOEFER, DEP’T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2008, at 5 (2009), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_rfa\\_fr\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2008.pdf).

<sup>170</sup> For an overview of the number of T visa petitions denied over the past 5 years, see ATT’Y GEN. 2008 TRAFFICKING REPORT, *supra* note 22, at 35.

cized an expansive approach as a means of rewarding migrants who deliberately violate the law to cross borders.<sup>171</sup>

The second option is to reexamine policies that do little to enhance border protection but increase the marginalization of all migrants, including trafficking victims. Eliminating the routine criminal prosecutions of illegal entrants along the southern border, working to identify, shame, and prosecute employers (and consumers) who profit from exploited labor forces, and applying National Labor Relations Act backpay remedies to all workers regardless of citizenship are all ways to improve the general status of migrants and increase protection for workers without creating perverse incentives to migrate unlawfully.

The degree to which antitrafficking rhetoric can be used in ways that cut against these goals, rather than promote them, is troubling. By fueling the image of the migrant as a criminal, antitrafficking rhetoric compounds the myth of migrant criminality. If migrants are perceived as dangerous criminals, the routine prosecutions of misdemeanor illegal entry seem like a logical and desirable border-security measure. A criminalized population is unlikely to garner sympathy when it is subject to exploitation in the workplace, thus rendering impossible the goals of collectively condemning unscrupulous employers and providing workplace remedies for the migrants abused by those employers. Once the issue has been framed as a problem of migrant criminals, then the most obvious—and the most frequently promoted—solution is to increase border controls and criminal enforcement of immigration law.

Antitrafficking policies have to start not with border control but with an effort to eliminate the marginalization that generates exploitation.<sup>172</sup> For this to happen, the discourse around trafficking needs to change. Enforcement officers at the highest levels need to pay more attention to how the problem of trafficking is characterized and how agents are trained to solve it. Advocates of antitrafficking measures need to be careful about how they characterize the problem of traf-

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<sup>171</sup> See Chacón, *supra* note 10, at 3022 (discussing TVPA's limited definition of trafficking in light of protecting victims who "consented" to some aspect of their transportation across borders).

<sup>172</sup> The relatively narrow recommendations set forth in this Article do not constitute a call for open borders, although some scholars have urged that this is the best way to eradicate not only trafficking but a whole host of other social ills. See, e.g., JOHNSON, *supra* note 138; cf. Bravo, *Free Labor!*, *supra* note 1, at 616 (urging a liberalized labor regime, which is a more modest version of the open-borders proposal); Gallagher, *supra* note 1, at 833-34 (arguing that trafficking is an inevitable byproduct of closed borders, but conceding that borders will be closed for the foreseeable future).

ficking when they push for antitrafficking measures at the state and local levels or propose reforms at the national and international levels. Inaccurate assumptions about migrant criminality and border security plague antitrafficking discussions. Rooting those assumptions out of the discourse is a starting point for moving the national (and international) conversation in a direction that will allow for the creation of antitrafficking strategies that do not have the perverse effect of fueling the marginalization that lies at the heart of trafficking.