

Resisting the Carceral: The need to align anti-trafficking efforts with movements for criminal justice reform

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Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

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Common calls to action around human trafficking continue to urge greater law enforcement attention, increased arrests of traffickers, and more prosecutions. While prosecution of traffickers is not a waste of time or money in every instance, problems arise when anti-trafficking resources are predominantly directed to law enforcement. This approach, which we see all too often, ties efforts to a criminal justice system that is mired in dysfunction. In many instances, the prosecution-based model reveals itself as antithetical to principles of human and civil rights, ignores the reality that many trafficking survivors confront, and redirects the conversation away from important critique and reform. By prioritising prosecution above all else, this approach distances itself from contemporary efforts to build inclusive racial, economic and gender justice movements centred around broader criminal justice reform.

As attorneys on a team that defends nearly all of the people arrested for prostitution throughout New York City, and survivors of trafficking who are subject to arrest and prosecution in myriad other ways, we have witnessed firsthand the overreliance on prosecution centred models—and the way this negatively impacts both our clients and larger anti-trafficking efforts. We have observed wave after wave of policies, legislation, and media campaigns that prioritise a law enforcement approach to the issue of human trafficking and measure success only in the number of arrests made,¹ regardless of the quality of the arrests, the sustainability of the ensuing prosecutions, or whether victims view the process as a good thing. As the net widens, arrests follow, often of those who may only be tangentially involved in the trafficking, or may even be trafficked themselves. This ‘all or nothing’ paradigm misses the mark.

Many, but not all, of our clients have experienced the levels of force, fraud or coercion that would allow them to be considered ‘trafficking victims’ under the law. Though originally conceived as an anti-trafficking project, framing our work in terms of trafficking has become increasingly problematic as many of our clients’ trafficking experiences—while brutal—pale in comparison to the systemic failures and violence they have endured for far longer. The majority are hindered by these daunting obstacles related to their marginalisation, even once no longer trafficked.

Lack of employment opportunities, access to education and affordable housing means survivors, even those identified by law enforcement and participating in prosecutions, continue to struggle post-trafficking. For example, a survivor of trafficking into prostitution was forced to turn to law enforcement when, after leaving her trafficker, he petitioned for custody of their child. Her trafficker was then arrested and is currently awaiting trial. Although free from his immediate control, she continues to confront many of the same struggles that made her vulnerable to trafficking in the first place. She has no high school education, minimal family support, and now, she is saddled with a criminal record because of the conduct in which he compelled her to engage. She has limited time or

¹ L Hersh, ‘To Eradicate Trafficking Prosecute the Pimps and the Buyers’, *Gotham Gazette*, 2 February 2016, <http://www.gothamgazette.com/index.php/opinion/6133-to-eradicate-sex-trafficking-prosecute-the-pimps-and-buyers>, retrieved 29 February 2016; K Moore, ‘Despite Outage, Sex Trafficking Arrests Rare in Metro Area’, *WWLTV.com*, 9 March 2015, <http://www.wvlv.com/story/news/2015/03/09/sex-trafficking-arrests-rare-in-metro-area/24677633/>, retrieved 29 February 2016. Calls for a prosecution-based approach are not limited to the United States. See: A Sparrow, ‘“Modern Slavery” Bill to Tighten Laws on Human Trafficking’, *The Guardian*, 28 August 2013 (British government officials lamenting the ‘shockingly low’ prosecution rates for human trafficking across Europe). Interestingly, the US Department of State’s annual *Trafficking in Persons Report* uses statistics on the number of prosecutions conducted when evaluating foreign governments’ efforts to comply with the ‘minimum standards for the elimination of trafficking’ found in Section 108 of the Trafficking Victims Protection Act. See: *Trafficking Victims Protection Act of 2000, Div. A of Pub. L. No. 106-386, 108, as amended*. For a critique of this approach, see: Women’s Commission for Refugee Women and Children, ‘The US Response to Human Trafficking: An unbalanced approach’, May 2007, <https://www.womensrefugeecommission.org/resources/document/472-the-u-s-response-to-human-trafficking-an-unbalanced-approach?catid=239>, retrieved 29 February 2016. (Noting ‘at issue is the entire conceptual framework of trafficking as a law enforcement issue and only a law enforcement issue’.) See also: J Chuang, ‘The United States as Global Sheriff: Using unilateral sanctions to combat human trafficking’, *Michigan Journal of International Law*, vol. 27, 2006, pp. 437–494.

resources to devote to her own healing and her lack of viable employment options further marginalise her, making raising her child extremely challenging. Stability in her life is further hindered by the sheer number of appointments required of her in order to receive meagre government assistance.

It is stories like these that we must keep in mind when constructing anti-trafficking policy. In order to truly help and empower survivors, we must first listen to them. Our clients seek access to a safe and living wage, opportunities for education, and affordable housing. They do not seek rescue at the hands of law enforcement or the court system. Yet, the loudest voices in the anti-trafficking movement continue to point to the criminal justice system as the place where the problem of human trafficking can be solved. It is these loudest voices, who insist on speaking for and about our clients, that fail to recognise the multiple ways our clients experience victimisation and violence, often as a result of poverty, homophobia, transphobia, racism, and sexism, and to consider how these larger systemic problems create vulnerability to exploitation and abuse. This failure increases the risk that anti-trafficking efforts result in the criminalisation of the very population purported to be its beneficiaries.

Trying to arrest our way out of a multi-faceted problem has failed before. Even where trafficking efforts may be understood as well-meaning, we will lose the ‘war’ on trafficking if we continue to fight it the same way we fought the war on drugs.² Both wars have overwhelmingly relied on the arrests of low-level offenders rather than perpetrators of more serious offences. As with the war against drugs, the collateral damage of anti-trafficking efforts that prioritise prosecution comes in the form of scores of arrests.

While the drug war resulted in the targeting of those possessing small amounts of controlled substances, the war on trafficking similarly targets individuals in the commercial sex industry for arrest—many of whom are trafficked into prostitution and many of whom are not. With commercial sex, while the media often touts the ‘success’ of sting operations aimed at rescuing victims,³ when unpacked, it is clear that these stings simply result in more arrests of people engaging in prostitution—ushering a steady flow of women (predominantly women of colour) into the clutches of the criminal justice system.⁴ The singular focus on prosecution exacerbates the already concerning power imbalance between law enforcement and those the law is crushingly enforced against.

More than that, when trafficking is framed as an individual act of violence into which the state must intervene, criminal prosecution becomes indispensable. This diverts attention from more difficult, but critical issues of state responsibility.⁵ If, instead, the state were required to take responsibility for the conditions that give rise to this abuse, we would see steps taken to eradicate poverty, provide safe and affordable housing, educate more widely, and dismantle oppressive systems across the board. However well-intentioned, wedding anti-trafficking efforts to our criminal systems means efforts end up exacerbating the harmful practices operating in criminal courts across the country—disproportionate arrests of people of colour, inadequately funded indigent defence systems, overreliance on jail and incarceration, and a lack of post-release services for those leaving prison. All of this serves to worsen conditions in certain communities, creating a fertile ground for exploitation and abuse in various labour sectors, including commercial sex.

In the United States, we find ourselves in a critical, and long overdue, moment in criminal justice reform. Conversation and practice are shifting, and efforts to challenge racially motivated policing, police violence, mass incarceration, and our ‘cimmigration’⁶ system, are finally gaining traction.⁷ Continuing to place anti-trafficking

² E N Brown, ‘America’s Newest War,’ *POLITICO*, 1 June 2015, <http://www.politico.com/magazine/story/2015/06/justice-for-victims-of-sex-trafficking-war-on-crime-118512>, retrieved 3 December 2015.

³ For example, recent reports document a ‘two-week prostitution sting operation’ meant to ‘bring focus to human trafficking’ in the Houston, Texas, area. However, despite ‘successful operations’ that landed more than 60 individuals in jail on prostitution charges, the reports are silent as to any arrests of traffickers. See: B Price, ‘60 Arrested in Another Texas Prostitution Sting Aimed at Human Trafficking’, 6 November 2015, <http://www.breitbart.com/texas/2015/11/06/60-arrested-another-texas-prostitution-sting-aimed-human-trafficking/>; See also: Tribune Staff, ‘High School Teacher Among 95 Arrested in Polk Prostitution Sting, Deputies Say’, *The Tampa Tribune*, 14 December 2015, <http://www.tbo.com/news/crime/95-arrested-in-polk-prostitution-sting-deputies-say-20151214/> (noting over 95 arrests for prostitution and solicitation as a result of ‘Operation Naughty but Not Nice’, including ‘suspects’ as young as 15 years of age).

⁴ In 2014, our team witnessed this firsthand, when despite the lack of empirical evidence supporting the notion that trafficking into prostitution increases around large sporting events, prostitution arrest numbers jumped almost tenfold in the two weeks leading up to the Super Bowl, held in our jurisdiction. These arrests, all made by undercover officers acting as ‘Johns’, reflect an increase in police activity rather than an increase in prostitution activity. The scenario repeated itself during the 2015 NBA All Star Game, also held locally to us in February 2015. At that time we saw a huge spike in prostitution arrests for that weekend alone.

⁵ See: L Beutin, ‘Criminalising Traffickers is an Alibi for State-Produced Vulnerability’, *Open Democracy*, 19 November 2015, <https://www.opendemocracy.net/beyondslavery/lyndsey-p-beutin/criminalising-traffickers-is-alibi-for-state-produced-vulnerability>

⁶ The term ‘cimmigration’ refers to the ‘criminalization of immigration law.... This convergence of immigration and criminal law brings to bear only the harshest elements of each area of law, and the apparatus of the state is used to expel from society those deemed criminally alien. The undesirable result is an ever-expanding population of the excluded and alienated.’ J Stumpf, ‘The Cimmigration Crisis: Immigrants, crime & sovereign power’, *American University Law Review*, vol. 56, 2006, pp. 376–78. See also: Y Vazquez, ‘Constructing Cimmigration: Latino subordination in a “post-racial” world’, *Ohio State Law Journal*, vol. 76, 2015, pp. 599–657.

⁷ See: ‘Stop and Frisk Attorneys Comment on Court Monitor’s Second Report’, 16 February 2016, <http://ccrjustice.org/home/press-center/press-releases/stop-and-frisk-attorneys-comment-court-monitor-s-second-report>. See also: D Graham, ‘A Year after Erik Garner’s

efforts squarely within these systems counteracts this progress. Arrests and prosecutions done in the name of combating trafficking then work to fortify the very systems other social justice movements are rightfully working to reform.

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Death: Has anything changed?', 17 July 2015, <http://www.theatlantic.com/politics/archive/2015/07/eric-garner-anniversary/398837/> ; D Ramsay, 'Tracking Police Violence a Year after Ferguson', 7 August 2016, <http://fivethirtyeight.com/features/ferguson-michael-brown-measuring-police-killings/> ; J Swaine, O Laughland, and J Lartey, 'Black Americans Killed By Police Twice as Likely to be Unarmed as White People', 1 June 2015, <http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis> ; 'Strange Bedfellows: Why are the Koch Brothers and Van Jones teaming up to end mass incarceration', 15 July 2015, http://www.democracynow.org/2015/7/15/strange_bedfellows_why_are_the_koch; T Mak, 'Koch Brothers to Bankroll Prison Reform', 13 January 2016, <http://www.thedailybeast.com/articles/2015/01/13/koch-bros-to-bankroll-prison-reform.html> ; P Baker, 'Obama in Oklahoma, Takes Reform Message to the Prison Cell Block', 16 July 2015, <http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html>. For a critique of the 'cimmigration' system, see: M Fan, 'The Case for Cimmigration Reform', *North Carolina Law Review*, vol. 92, no. 1, 2013, pp. 101–169.