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THE PUBLIC DEFENDER AS ANTI-TRAFFICKING ADVOCATE, AN UNLIKELY ROLE: HOW CURRENT NEW YORK CITY ARREST AND PROSECUTION POLICIES SYSTEMATICALLY CRIMINALIZE VICTIMS OF SEX TRAFFICKING

Kate Mogulescu†

INTRODUCTION

J.C., now seventeen years old, was sixteen when she was first recruited into commercial sex. With her father recently incarcerated and facing numerous conspiracy charges, and her mother stressed out, anxious, and increasingly abusing drugs, J.C. wanted nothing more than a way out of her house. She spent as much time as possible anywhere other than home. One day, while hanging out with a group of her friends, she was approached by S., a fairly well known pimp in her Western Maryland town, more than twice her age. The relationship began with S. buying J.C. new clothes and food, and taking her to the movies. S. would quickly provide anything J.C. wanted those first few days. However, within a short period of time, he began prostituting her throughout Maryland by advertising her through pictures on a common website and arranging her dates. He instructed her how much to charge for different sexual acts, advised her how to avoid arrest, provided her with false identification so that she would pass for older than she was, and took all of the money earned from her dates. Some nights she would see between ten and fifteen customers. J.C. soon learned that S. prostituted a few other young women as well, including her aunt, who was close in age to J.C. In the beginning, S. was not violent with J.C., but he made sure that she observed him disciplining

† The author is a Staff Attorney in the Criminal Defense Practice of the Legal Aid Society of New York, and as such, is the appointed defender on hundreds of criminal cases brought in New York City criminal courts each year, a practice which provided the foundation for this article. It is the experience of her clients that inspired this work. Each day, she is impressed by their immeasurable resilience, strength, and perseverance. This article is dedicated to those clients and to a wonderful group of colleagues, interns, friends, and family. In particular, the author would like to thank Megumi Saito for volunteering invaluable time and research assistance, and is enormously indebted to Angela Shirlaw, without whom this work would not be possible, Kendea Johnson, Alyssa Gamliel, and Marian, Sara, and William Mogulescu for their ongoing support.

his other women with violence if they failed to comply with his orders.

S., like many other pimps, enforced a strict set of rules. These rules were well known to the young women. They ensured that S. continued to profit from prostitution and that those under his control remained so. The women under S.'s control: could never refer to him by his true name, only "Daddy"; always had to make themselves physically lower than S., for example, by standing on the street if S. stood on the sidewalk; had to meet a specific quota of money earned through prostitution each night; could not keep any of the money they earned, as it was all given to S.; and could not make eye contact with another pimp. J.C. and the other women prostituted by S. were only referred to as "bitch" or "ho." If S.'s victims broke any of these rules, they would be subjected to violence, abuse, or sexual assault.¹

In October of 2011, S. brought J.C. to New York City to prostitute her. In addition to posting pictures and ads for her services online, he would drive her to various locations known for prostitution in Brooklyn and Manhattan and have her walk these areas looking for dates. One night, while driving, S. became angry with J.C. because of a perceived disrespect. He stopped the car, and told her she had to get out of the vehicle. He yelled and screamed at J.C., berating her, and telling her she was a "worthless lazy bitch" whom he never should have bothered bringing to New York City. He continued to scream at her as she exited the car. This caught the attention of two officers of the New York City Police Department ("NYPD"), assigned to the Thirteenth Precinct. The officers were on a standard anti-crime patrol in Midtown Manhattan, in an area they identified as prostitution-prone, i.e., frequented by people engaged in prostitution.²

¹ These rules, familiarly known as the "rules of the game," are common in pimp-controlled prostitution, widely promulgated, and enforced. *See, e.g.*, POLARIS PROJECT, *Domestic Sex Trafficking: The Criminal Operations of the American Pimp*, http://www.dcjs.virginia.gov/victims/humantrafficking/vs/documents/Domestic_Sex_Trafficking_Guide.pdf (last visited May 2, 2012); RACHEL LLOYD, *GIRLS LIKE US: FIGHTING FOR A WORLD WHERE GIRLS ARE NOT FOR SALE, AN ACTIVIST FINDS HER CALLING AND HEALS HERSELF* 98 (2011). *See also* *United States v. Pipkins*, 378 F.3d 1281, 1286 (11th Cir. 2004) (noting that when under pimp control, women must follow rules imposed or "[e]ndure beatings with belts, baseball bats, or 'pimp sticks' (two coat hangers wrapped together). The pimps also punished their prostitutes by kicking them, punching them, forcing them to lay naked on the floor and then have sex with another prostitute while others watched, or 'trunking' them by locking them in the trunk of a car to teach them a lesson."); *United States v. Todd*, 627 F.3d 329, 331–32 (9th Cir. 2010).

² Supporting Deposition of NYPD Officer Giro Maccheroni, *People v. J.C.*,

The officers approached J.C. directly. They did not ask her if everything was okay. They did not ask her who this older man was or why he was screaming at her. They did, however, instruct her that she was going to be placed under arrest for loitering for the purpose of engaging in prostitution. J.C. found this to be confusing, as she had merely stepped out of his car seconds before, not even on the sidewalk long enough to be loitering. When J.C. protested her arrest, and S. began to question the officers as well, the officers indicated that if J.C. simply cooperated with them and did not give them a hard time, they would not arrest S. Fearful of the repercussions of doing anything that may get S. in trouble, J.C. ceased protesting, ceased asking questions about the reason for her arrest, and allowed the police to arrest her. When asked for identification, she produced the fraudulent identification card that S. had made for her. The arresting officer saw immediately that the identification was fake, and indicated to J.C. that he was going to do her a favor, and not take it from her. She admitted to the officer that she was, in fact, seventeen, not as old as the identification purported. The officer then returned the identification to S., placed J.C. under arrest, and allowed S. to drive away. J.C. was held overnight awaiting arraignment on the criminal charges of loitering for the purpose of engaging in prostitution. Despite her age, and the circumstances of her arrest, J.C. was prosecuted as an adult in Manhattan Criminal Court. S. was never even investigated.

Human trafficking has gained tremendous traction as a national and international issue. Referring to human trafficking as “modern-day slavery,”³ media and anti-trafficking advocates celebrate the few instances in which traffickers have been investigated or arrested for their crimes.⁴ Calls for tougher sanctions and penalties on trafficking abound.⁵ Human trafficking has become a policy

2011NY076356 (N.Y. Co. Crim. Ct., Oct. 21, 2011) (on file with City University of New York Law Review).

³ See Janie Lynne Musto, *What's In a Name? Conflations and Contradictions in Contemporary U.S. Discourses of Human Trafficking*, 32 WOMEN'S STUD. INT'L FORUM 281, 286 (2009). See also Nicholas Kristof, *The Face of Modern Slavery*, N.Y. TIMES, Nov. 17, 2011, at A31; NEW YORK CITY COUNCIL, COMMS. ON WOMEN'S ISSUES AND PUBLIC SAFETY, OVERSIGHT: COMBATting [sic] Sex Trafficking in NYC: Examining Law Enforcement—Prevention and Prosecution 5 (2011), <http://legistar.council.nyc.gov/View.ashx?M=&ID=1583865&GUID=46919547-BF55-4D2B-96A9-2167995C7B77> [hereinafter OVERSIGHT REPORT].

⁴ See, e.g., Rocco Parascandola, *Sex-Slave Horror Story for a Little Girl*, N.Y. DAILY NEWS, May 1, 2011, at 8; William J. Gorta, *Pimp Fiend Indicted: DA*, N.Y. POST, Jan. 27, 2011, at 10; Karen Zraick, *8 Charged in Brooklyn Sex Trafficking Case*, N.Y. TIMES, June 2, 2010, at A28.

⁵ See, e.g., Mike McGraw, *States at Opposite Ends of Scale in Penalizing Traffickers*, KAN.

priority nationally and in New York State, and recent federal and state legislative developments further highlight the emerging importance of the issue.

Despite a robust anti-trafficking discourse, these notions have not permeated the spheres of urban policing and local criminal courts. Instead, many victims of sex trafficking are arrested and prosecuted for conduct that they are compelled to engage in. Swept up in a criminal justice system that depends on the swift and thoughtless processing of criminal cases in record times, sex trafficking victims are not identified or thought of as victims. The arrest strategy employed by the NYPD prioritizes a high volume of arrests for low-level offenses. Prostitution offenses are precisely such charges. Criminal courts designated to process this high volume are ill-equipped to explore the circumstances of each case individually. As a result, many exploited and trafficked people are processed in criminal court without the tragedy of their situation being brought to light. The complicated dynamics of prosecutorial discretion and power can further undermine the process.

Current criminal justice practice fails to adequately identify many of these individuals as victims, and to offer any meaningful intervention. Thus, as victims cycle in and out of the criminal justice system, the devastating impact is a re-victimization, which only exacerbates the danger, isolation, and marginalization of the victims' experiences. The responsibility of formulating a response then falls on public defenders, those charged with defending the rights of the accused. As they aspire to do in each type of case to which they are assigned, public defenders must work to expose this unjust phenomenon, to advocate for those criminalized, and to vigorously protect the interests of their client. The difference, however, when dealing with those charged with prostitution offenses, is the clear overlap between the experience of this group of criminal defendants and the victim class that the anti-trafficking movement seeks to protect. The failure to make the connection between these two groups constitutes a serious failing and oversight on the part of those dedicated to combating human trafficking.

Despite this reality, the anti-trafficking movement is largely made up of law enforcement groups, prosecutors, and service providers, and rarely is the public defender heard of as part of the dis-

CITY STAR, Dec. 1, 2011, available at 2011WLNR24827141; Alan Johnson, *Call to Toughen 'Slavery' Law*, COLUMBUS DISPATCH, Jan. 12, 2010 at B1; Editorial, *Targeting Human Trafficking*, N.Y. TIMES, May 21, 2007, at A18.

cussion.⁶ This article was born out of the experience of representing and advocating for individuals arrested for prostitution offenses in New York City. Public defenders constitute the true front line in advocating for survivors of sex trafficking in the criminal justice system, an unlikely role, but one that current arrest and prosecution policies make necessary.

I. LEGISLATIVE FRAMEWORK: FEDERAL AND NEW YORK LAW

Federal laws define sex trafficking as forced sexual labor. Pursuant to the Trafficking Victims Protection Act (“TVPA”) of 2000,⁷ and its reauthorizations, federal law prohibits all forms of trafficking, but explicitly defines trafficking as “severe” when a commercial sex act is induced by force, fraud, or coercion, or when the person induced to perform such act has not attained eighteen years of age.⁸

Similarly, New York has an extensive statutory scheme designed to prevent trafficking, punish perpetrators of trafficking, and protect those at risk of victimization. In 2007, New York enacted its own sex trafficking statute, which criminalized many common forms of sex trafficking.⁹ New York’s anti-trafficking statutory scheme reinforces many of the concerns demonstrated in federal law, and similarly seeks to specifically protect youth vulnerable to commercial sexual exploitation.

In addition to being identified as a victim of a severe form of trafficking, an individual under the age of eighteen arrested for prostitution is now defined by New York law as a “sexually exploited child” under the Safe Harbour for Exploited Children Act (“Safe Harbor”).¹⁰ This universally lauded statute was enacted to reconcile the incongruity between New York’s arrest and prosecu-

⁶ For example, the Department of Justice funds anti-trafficking task forces nationwide consisting of law enforcement, prosecutors, and non-governmental organizations (“NGOs”). See U.S. DEPT. OF STATE, *TRAFFICKING IN PERSONS REPORT 340* (2010), available at <http://www.state.gov/documents/organization/142979.pdf>. Public defender organizations, even in the largest metropolitan areas, are not invited to sit on these task forces. Rather, the task forces are “based on a sound strategy of collaboration among state and local enforcement, trafficking victim services providers, federal law enforcement, and U.S. Attorneys Offices.” U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *ENHANCED COLLABORATIVE MODEL TO COMBAT HUMAN TRAFFICKING, GRANT ANNOUNCEMENT*, (F. Y. 2011), available at <http://www.ojp.usdoj.gov/BJA/grant/htf.html> (last visited Apr. 18, 2012).

⁷ TVPA of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

⁸ 22 U.S.C. § 7101 (2006).

⁹ N.Y. PENAL LAW § 230.34 (McKinney 2011).

¹⁰ N.Y. SOC. SERV. LAW § 447-a (McKinney 2011).

tion policy and federal human trafficking law.¹¹ Furthermore, New York has enhanced penalties for those charged with promoting prostitution where they knowingly advance or profit from the prostitution of those under the age of eleven, sixteen, and nineteen respectively.¹²

New York has also implemented an innovative remedy for those victims criminalized as a result of having been trafficked. The 2010 amendment to Article 440 of the Criminal Procedure Law creates a specific mechanism for survivors of trafficking to vacate prior prostitution convictions if the acts were committed as a result of having been trafficked.¹³ This law was the first of its kind, leading several other jurisdictions to implement similar provisions to benefit survivors of trafficking.¹⁴ In enacting the amendment, the legislature specifically sought to “remove a blot on the character of such victims so as to help those presumably not criminally responsible for the offense to gain useful employment and rebuild their lives.”¹⁵

This legislation represents a critical step. It acknowledges, and attempts to rectify, the fact that survivors of sex trafficking are criminalized under current practice.¹⁶ However, as described more

¹¹ See, e.g., Editorial, *A Victory for Exploited Children*, N.Y. TIMES, Sept. 26, 2008, at A20.

¹² See, e.g., N.Y. PENAL LAW §§ 230.20, 230.32, 230.35 (McKinney 2011).

¹³ The law now provides, in relevant part, that a motion to vacate a judgment of conviction may be granted where:

[T]he arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or section 230.00 (prostitution) of the penal law, and the defendant’s participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law or trafficking in persons under the Trafficking Victims Protection Act.

N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2011).

¹⁴ Andrew Keshner, *Prostitution Conviction is Vacated Under New Law*, 245 N.Y.L.J. 88, 1 (2011). See, e.g., 725 ILL. COMP. STAT. ANN. 5/116-2.1 (West 2011); MD. CODE ANN. CRIM. PROC. § 8-302 (West 2012); NEV. REV. STAT. § 176.515 (West 2011).

¹⁵ Peter Preiser, Supp. Prac. Comment., CRIM. PROC. LAW § 440.10 (McKinney 2010).

¹⁶ There have been five published decisions under the amended statute to date, each granting the motion to vacate the prior conviction and dismissing the underlying accusatory instruments. See *People v. G.M.*, 32 Misc. 3d 274, 280 (N.Y. Co. Crim. Ct. 2011); *People v. Gonzalez*, 32 Misc. 3d 831, 836 (N.Y. Co. Crim. Ct. 2011); *People v. Doe*, 34 Misc. 3d 237, 241 (N.Y. Sup. Ct. 2011); *People v. S.S.*, 948 N.Y.S.2d 520 (N.Y. Co. Crim. Ct. 2012); *People v. A.B.*, 35 Misc. 3d 1243(A), Slip Copy, 2012 WL 2360942 (Table) (N.Y. Co. Crim. Ct. 2012). Several other survivors of trafficking have similarly had convictions vacated without published decisions. See Erica Pearson, *New Law Lets Sex-Trafficking Victims Clear Their Convictions*, N.Y. DAILY NEWS, September 9, 2012 at 18.

fully in the sections that follow, very little is being done to prevent the criminalization from occurring in the first place and eliminate the need for the post-conviction relief offered in the newly amended law. In response, the Legal Aid Society (“LAS”), the nation’s largest and oldest provider of free legal services to the indigent, and the primary public defender in New York City, has developed a specialized pilot project that focuses on its representation of those individuals charged with prostitution.

The Trafficking Victims Legal Defense and Advocacy Project (“TVLDAP”) was created in March 2011, and represents the first effort by a public defender office to address the problem of systemic criminalization of victims of trafficking and exploitation.¹⁷ The project uses an interdisciplinary team of attorneys and social workers to screen each case and connect clients to important services. It further seeks to slow the pace of the criminal court process to allow time for clients to be adequately assessed and build closer relationships with the project team. Additionally, TVLDAP works closely with individuals charged with prostitution offenses to provide this marginalized client group options for assistance and support, and engages in court advocacy, social work services, and holistic representation.

Drawing on the first year of TVLDAP’s work, it has become clear that LAS cannot solve this problem alone. Indeed, by the time those arrested become TVLDAP clients, much of the damage has already been done. Current arrest policies must be more critically examined, and changed, in order to truly support those being trafficked and exploited, both in New York City and in other jurisdictions.

II. VICTIMS OF SEX TRAFFICKING CONTINUE TO BE CRIMINALIZED AND FURTHER VICTIMIZED BY CURRENT ARREST AND PROSECUTION POLICIES

A. *Prostitution Arrests in New York City*

In 2011, more than 2,800 people were arrested and prosecuted in New York City criminal courts for engaging in prostitution-related activity.¹⁸ Those arrested are often victims of ongoing

¹⁷ TVLDAP is jointly funded by the Legal Aid Society and the NoVo Foundation, dedicated to eradicating exploitation of and violence against women and girls. See NOVO FOUNDATION, <http://novofoundation.org> (last visited Apr. 18, 2012).

¹⁸ N.Y. DIV. OF CRIMINAL JUSTICE SERVS., COMPUTERIZED CRIMINAL HISTORY ORACLE FILE (Feb. 2012) (on file with City University of New York Law Review) [hereinafter DCJS CRIMINAL HISTORY].

trafficking and exploitation, and overwhelmingly meet all of the legal criteria for sex trafficking under either New York or federal law.¹⁹ This victimized group comprised both non-citizens and United States citizens alike, and includes domestically trafficked young people who have experienced extreme abuse, subjugation, and exploitation.

Despite the recent reforms and robust legislative framework described above, little has changed for those being victimized. To the contrary, the criminal justice system in New York City continues to systematically criminalize victims of trafficking. Of the 189 individuals TVLDAP represented in its first eleven months, more than sixty disclosed trafficking histories, which included control by pimp-traffickers, and another thirty-seven were identified as being at extremely high risk for trafficking.²⁰

In addition to J.C., other clients represented by the project thus far include:

- A fifteen year-old girl who left her family home in New Jersey and was listed on the National Center for Exploited and Missing Children Registry. She took a bus to Port Authority where she was approached by a pimp who bought her something to eat within a few minutes of their meeting. When arrested by the police, she reported that she was eighteen years old, as instructed by the pimp for whom she had been working since her arrival in New York City. The police took no steps to ascertain her true identity or age, or to investigate if she was, in fact, a missing child. Instead, she was processed through the criminal court system as an adult.
- A Chinese national who, after paying an exorbitant fee to be smuggled into the U.S., arrived at the airport, had her only identification documents removed by her trafficker, and was driven for days to a remote location that she soon learned was a brothel, where she was made to engage in sexual con-

¹⁹ See, e.g., Nicholas Kristof, *What About American Girls Sold on the Streets?* N.Y. TIMES, April 24, 2011, at 10. See also Chief Judge Lippman, *Foreword to LAWYER'S MANUAL ON HUMAN TRAFFICKING & Pursuing Justice for Victims*, at xvii (Jill Laurie Goodman & Dorchen Leidholdt eds., 2011), available at <http://www.nycourts.gov/ip/womeninthe courts/LMHT.pdf> (“[M]any adult or child victims of human trafficking are arrested and brought to court as defendants on prostitution-related charges.”); New York State Assembly Memo for Bill, State Assemb. B., Reg. Sess. (N.Y. 2010), http://assembly.state.ny.us/leg/?default_fld=&bn=A07670&term=2009&Memo=Y (“Victims of sex trafficking who are forced into prostitution are frequently arrested for prostitution-related offenses.”).

²⁰ Interim Progress Report from Legal Aid Society Trafficking Victims Legal Defense and Advocacy Project to the NoVo Foundation (Feb. 2, 2012) (on file with City University of New York Law Review).

duct with numerous customers. She escaped from this location, only to have her traffickers threaten to kill every member of her family both in the U.S. and in China if her family did not pay \$70,000 as penalty for her escape. Alone in New York, with no work authorization and unable to speak English, she was lured to another brothel with the promise of easy money she could use to pay her escape fee. She was arrested there by the NYPD in August.

- A twenty-four year-old woman who entered prostitution at the age of fifteen, when she ran away from her foster home, only to be exploited by a series of pimps in the years since. This woman has been arrested four times in the last two months. The officers from the NYPD's Midtown North Precinct have told her, in no uncertain terms, that she will continue to be arrested, every time they see her, whether or not she is doing anything criminal. They continue in this manner in spite of the fact that at the time of her most recent arrest, she had a black eye and bruises all over her, as a result of the violent behavior of her pimp. When the police noticed this, their response was to joke, in front of her, that she had probably had a "bad date."

Unfortunately, these cases are not unique. The majority of those arrested for prostitution have significant traumatic histories, and endure brutal exploitation and abuse at the hands of traffickers, yet they continue to face arrest. The devastating impact of this cannot be understated. Many victims struggle with lengthy criminal records as a result of their involvement with the criminal justice system. These records plague them, even after they have escaped a trafficker, and act as a bar for many forms of housing, employment, and other opportunities. Furthermore, the experience of arrest and prosecution is itself sufficiently traumatic.

People arrested for prostitution endure particularly inappropriate conduct from the police officers who arrest them. This can range from inappropriate comments and reprehensible conditions of confinement, to being forced to remain naked in front of various officers for extended periods of time, to being propositioned by officers, or asked to perform sex acts in exchange for avoiding arrest.²¹ Fear of retaliation deters many from reporting such misconduct. In this way, current police practice and arrest policies often serve to further victimize trafficking victims.

²¹ JUHU THUKRAL & MELISSA DITMORE, SEX WORKERS PROJECT, URBAN JUSTICE CTR., *REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY* 34-38 (2003), <http://www.sexworkersproject.org/downloads/RevolvingDoor.pdf>.

B. *Impact of Prosecutorial Discretion*

The treatment of those arrested for prostitution is not much better once they enter the criminal court system. For those who are arrested numerous times for prostitution—a population at high-risk for trafficking and exploitation—prosecutors routinely seek incarceration.²² Even where there is a specific suspicion that a criminal defendant may have been trafficked, many prosecutors employ a heavy-handed approach to compel cooperation with their investigations rather than work to connect the victim to services.²³

Although victim cooperation with law enforcement is one important part of a strategy to prevent and prosecute sex trafficking, this cannot be the only goal. A singular focus on cooperation with law enforcement, and an unwillingness to provide services unless a victim cooperates to the officer's subjective satisfaction, is irreconcilable with the reality that many victims confront.²⁴ Many victims face a significant safety risk if they provide information to law enforcement, a risk that is not eliminated even when a trafficker is arrested or incarcerated. Similarly, many victims have had negative experiences with law enforcement, and this presents severe barriers to building the trust necessary to cooperate in an investigation. Many trafficked people are unaware that their experience meets the legal criteria for sex trafficking, as their only experience with law enforcement has been their own arrest for prostitution activity, or they do not self-identify as victims of trafficking.²⁵ For these reasons, a victim may be hesitant or incapable of ever cooperating in an investigation with law enforcement, but even more so without the support of valuable social services.

Nevertheless, it is cooperation with law enforcement—or what

²² See, e.g., Lincoln Anderson, *New Combined Effort on Quality of Life, Prostitution*, THE VILLAGER, Vol. 75 No. 25 (November 9–15, 2005), available at http://www.thevillager.com/Villager_132/newcombinedeffordon.html (reporting on how prosecutors in the Midtown Community Court are seeking the penalty of ninety days in prison so as to prevent recidivist prostitutes from walking off with time served).

²³ See, e.g., Lauren Hersh, *Sex Trafficking Investigations and Prosecutions*, in LAWYER'S MANUAL ON HUMAN TRAFFICKING PURSUING JUSTICE FOR VICTIMS 269 (Jill Laurie Goodman & Dorchen Leidholdt eds., 2011), available at <http://www.nycourts.gov/ip/womeninthecourts/LMHT.pdf> (noting that it may be easier for prosecutors to maintain contact with an "arrested victim" and "an arrested victim who fears prosecution may offer useful information in exchange for a dismissal").

²⁴ Ankita Patel, *Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking*, 9 SEATTLE J. SOC. JUST. 813, 821–29 (2011).

²⁵ See MELISSA DITMORE, SEX WORKERS PROJECT, URBAN JUSTICE CTR., KICKING DOWN THE DOOR: THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS 24 (2009), <http://www.sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf>.

is considered sufficient or acceptable cooperation with law enforcement—that determines whether someone may be considered a victim of sex trafficking, as opposed to the person’s actual experience. Thus, the plight of many prosecuted in the system is missed completely. In order for a prosecutor to consider that someone charged with prostitution may, in fact, be trafficked, the individual charged must demonstrate it to the *prosecutor’s* satisfaction. Furthermore, victims must cooperate in the specific way deemed appropriate by prosecutors in order to qualify for the “benefits” of identification as a victim, regardless of whether that is best suited to their particular circumstance or empowerment.

Prosecutors appoint themselves as the only true arbiters of whether someone has been trafficked, whereas the process of identifying an individual as a trafficking victim should be multi-faceted and interdisciplinary.²⁶ The unreasonably stringent exercise of prosecutorial discretion is unlikely to lead to effective cooperation with law enforcement and may instead increase victims’ feelings of distrust and low self-esteem.

Current efforts center on a criminal justice approach, rather than either a victim-centered or human rights approach.²⁷ This approach is governed by a singular focus on apprehending perpetrators rather than supporting survivors. It creates situations where victims must make difficult decisions about whether to cooperate before they have been provided services or an opportunity to develop stability and independence. Indeed, in the few cases where police or prosecutors have identified someone arrested for prostitution as a potential victim of trafficking, the victim *must* cooperate in the time frame deemed appropriate by the prosecutor in order to escape criminalization. Should the victims be unwilling or unready, at the precise moment of arrest, or immediately thereafter, they are made to go through the criminal court process marked as defendants.

This practice on the state and local level is analogous to the experience under federal law over the last decade. For many undocumented victims of trafficking, concerns about deportation or

²⁶ Patel, *supra* note 24, at 828 (noting “when law enforcement is the primary agency that determines who is a trafficking victim, law enforcement is improperly placed in the position of jurist, which probably explains the cause of frustrations among advocates, service providers, and community leaders”).

²⁷ See *id.* at 814, 820. See also Cherish Adams, *Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims*, 43 GEO. WASH. INT’L L. REV. 201, 215 (2011) (providing a more thorough discussion of the limitations of a criminal justice approach in combating human trafficking).

immigration detention compound the issues they already face. The TVPA recognizes this phenomenon, and provides an immigration remedy, in the form of a T-Visa, to those who meet the legal criteria for trafficked persons.²⁸ However, an applicant for a T-Visa must demonstrate cooperation with law enforcement, resulting in a dramatic underutilization of this remedy. Although the TVPA authorizes the grant of up to 5,000 T-Visas each year, only 1,862 were granted between 2002 and 2010.²⁹ Requiring cooperation—as defined by the prosecutor—in order for victims to qualify for protections such as a T-Visa similarly reflects the criminal justice approach in anti-trafficking efforts, which monolithically encourages and prizes the arrest of traffickers.³⁰

Victims must first be supported with opportunities that encourage stability and healing before the question of potential cooperation with law enforcement can be considered. Conditioning access to protection, services, benefits, and legal status on an arbitrary concept of cooperation is ineffective, and fails to serve the important goal of empowering survivors of trafficking. Indeed, while victim participation in the investigation of traffickers should be encouraged at the appropriate time, current practice falls short of one of the most important goals of the TVPA, namely, that victims of human trafficking not be “inappropriately incarcerated, fined, or penalized.”³¹ Law enforcement has demonstrated its inability to adequately monitor its own behavior in this regard, and this has contributed to the ongoing criminalization of trafficking victims.

C. *Current Practice Promotes Traffickers’ Control Over Victims*

Current arrest and prosecution practices also provide traffickers with a powerful tool to continue exploiting people under their control. Numerous clients report being warned by their trafficker that, because they have a prostitution record, they will never be able to obtain legal employment, and that if they consider filing a report, no one would believe them because they are merely prostitutes.³² Victims’ experience in the criminal justice system only rein-

²⁸ See 22 U.S.C. § 105 (2008).

²⁹ ALLISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS* (2010), <http://www.fas.org/sgp/crs/misc/RL34317.pdf>.

³⁰ Patel, *supra* note 24, at 814.

³¹ 22 U.S.C. § 7101(b)(19) (2006).

³² Patel, *supra* note 24, at 824.

forces this as they hear police officers talk about them in the same manner, and then find the sentiment echoed in the courtroom.

Traffickers use victims' criminal histories as grounds for bringing proceedings against them in Family Court, and as a consistent threat for clients who are undocumented immigrants. When a TVLDAP client recently left her trafficker, the trafficker immediately went to Family Court to seek custody of the daughter they had in common. The basis for his claim that she was an unfit mother was the series of prostitution convictions on her record—while he was forcing her to engage in prostitution.

Traffickers know that prostitution convictions present severe immigration consequences for those seeking status in the U.S. and use the threat of notifying immigration authorities as a way to compel compliance. Traffickers take advantage of their victims' isolation, and deceive them into thinking that they lack any legal protections and that reporting will result in arrest, deportation, and even abuse by authorities.³³ Once a victim has a prostitution conviction on his or her record, it simply provides more ammunition for the trafficker.

D. Misconceptions Dominate at the Criminal Court Level

Misconceptions regarding the reach of trafficking exacerbate the prosecution of victims of sex trafficking in local criminal courts. There is a general misunderstanding of trafficking as something that occurs in developing nations, or necessarily involves the smuggling of people between nations, or foreign-born individuals. Additionally, there is a mistaken sense that those arrested for prostitution in New York City—primarily U.S. citizens—could not be affected by force, fraud, or coercion. This is so even though, according to a Special Report from the Bureau of Justice Statistics, four-fifths or 83% of victims in confirmed trafficking incidents between 2008 and 2010 were identified as U.S. citizens.³⁴

In addition, although the severity of the trafficking of youth into sexual labor is clearly acknowledged by both federal and state law, arrest and prosecution policy in New York City presents an inconsistent result. Indeed, in its plainest form, the TVPA holds

³³ See NEIL A. WEINER & NICOLE HALA, VERA INST. OF JUSTICE, MEASURING HUMAN TRAFFICKING: LESSONS FROM NEW YORK CITY 5–6 (Aug. 2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/224391.pdf>. See also Patel, *supra* note 24, at 814.

³⁴ DUREN BANKS & TRACEY KYCKELHAH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Special Report: Characteristics of Suspected Human Trafficking Incidents 2008–2010 1 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/csh0810.pdf>.

that “[a]n adult is a victim of sex trafficking if he or she is subjected to commercial sex acts by force, fraud, or coercion. A child under the age of [eighteen] is a victim simply if he or she is subjected to commercial sex acts.”³⁵ However, those under the age of eighteen engaging in prostitution in New York City are continuously arrested and prosecuted in local criminal courts as adults despite the fact that under federal law, they are clearly to be considered victims of a severe form of sex trafficking.³⁶ This is the case even though under New York law, they are defined as “sexually exploited” children³⁷ and there are escalated penalties associated with trafficking or promoting prostitution of those under nineteen.³⁸

In 2011, sixty-four minors who reported their age to be under eighteen were arrested for prostitution activity and prosecuted as adults in criminal court in New York State.³⁹ This number has held fairly constant since the passage of Safe Harbor.⁴⁰ Even more troubling is the fact that the percentage of these arrests resulting in a misdemeanor conviction for the defendant is rising.⁴¹ Recent challenges to these prosecutions citing federal and state anti-trafficking statutes and definitions have drawn mixed results.⁴² Indeed, the “fact that the prostitution of U.S. minors likely constitutes trafficking is not well understood by most, including law enforcement.”⁴³

E. Court System Response in New York

Recognizing that “trafficking cases present difficult challenges for the criminal justice system,”⁴⁴ the criminal court system has attempted to craft a response to the high volume of prostitution cases heard in its lower courts each year. In New York City, there are two prostitution diversion parts to which a percentage of prosti-

³⁵ *Id.*

³⁶ See 22 U.S.C. § 7101 (2006).

³⁷ See N.Y. SOC. SERV. LAW § 447-a (McKinney 2011).

³⁸ See, e.g., N.Y. PENAL LAW §§ 230.32, 230.20, & 230.35 (McKinney 2011).

³⁹ DCJS CRIMINAL HISTORY, *supra* note 18.

⁴⁰ In 2009, there were sixty-five prosecutions of the same age group statewide. The year 2010 saw sixty-six such prosecutions. *Id.*

⁴¹ *Id.*

⁴² Compare *People v. Samantha R.*, 33 Misc. 3d 1235(A) (Kings Co. Crim. Ct. Dec. 16, 2011) (dismissing charge of loitering for the purpose of engaging in prostitution in the interests of justice in light of the fact that the defendant was sixteen years old at time of arrest) with *People v. Lewis*, 2010NY03560, N.Y.L.J. 1202502663175, at *1 (N.Y. Co. Crim. Ct. July 12, 2011) (denying similar motion where defendant was seventeen years old at time of arrest).

⁴³ OVERSIGHT REPORT, *supra* note 3, at 5.

⁴⁴ Lippman, *supra* note 19, at xvii.

tution cases in Manhattan and Queens are routed.⁴⁵ These diversion parts, which seek to connect those charged with prostitution offenses to social services, represent a step in the right direction as they acknowledge the critical need for services among this population. However, in both courts, connection to services is tied to a guilty plea, either to an infraction level offense, or to a misdemeanor charge, with the exception of arrestees who have had no prior contacts with the criminal justice system.⁴⁶ Neither diversion part is far-reaching enough, as many charged with prostitution offenses are adjudicated without being offered the possibility of services. Furthermore, these projects only exist in Manhattan and Queens. There is no designated prostitution courtroom, or model, in Brooklyn, the Bronx, or Staten Island.

While these court programs seek to address some of the issues confronted by those arrested for prostitution, the largest problem is that they cannot undo the damage caused by the unjust arrests themselves.⁴⁷ Indeed, no matter how sympathetic or sensitive the court response may be, the mere existence of the criminal case and the experience of being arrested and then prosecuted in criminal court is devastating for someone being trafficked and exploited.⁴⁸ This is the perverse result that must be avoided. In order to truly ameliorate conditions of human trafficking, the NYPD must be held accountable for the prostitution arrests it makes, both in terms of the overwhelming quantity and the appallingly low quality.

⁴⁵ Courtney Bryan, *Representing and Defending Victims of Commercial Sexual Exploitation in Criminal Court*, LAWYER'S MANUAL ON HUMAN TRAFFICKING & PURSUING JUSTICE FOR VICTIMS, at 190 (Jill Laurie Goodman & Dorchon Leidholdt eds., 2011), <http://www.nycourts.gov/ip/womeninthecourts/LMHT.pdf>.

⁴⁶ *Id.*; see also Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 342 (2005) (discussing how problem-solving courts create a "system of social service programs grafted onto people, many of whom did not need to be in the Criminal Court in the first place").

⁴⁷ *Id.* at 340–41.

⁴⁸ *People v. Samantha R.*, 33 Mis. 3d 1235(A) at *5 (lauding the willingness of the District Attorney's office to refer the defendant to services as a condition of the disposition of her criminal case, but recognizing that:

I cannot ignore the fact that the court retains the power to sentence the defendant to up to fifteen days in jail if she should ultimately fail to finish the STAR program and is then convicted of the charged offense, and that as a consequence of any such conviction she would have a potentially life-long criminal record, albeit for a violation. Nor can I ignore that her continued prosecution in criminal court may traumatize her to a greater extent than the prosecution of an adult defendant would affect an adult. These concerns counsel against continuing a prosecution, no matter how sensitively handled by the District Attorney.)

III. LAW ENFORCEMENT MUST ADAPT ITS STRATEGY TO TRULY ADDRESS THE ISSUE OF SEX TRAFFICKING

The NYPD's current arrest policy is at odds with the goal of appropriately investigating and prosecuting sex trafficking. That is not to say that the NYPD does not profess that the prevention and investigation of human trafficking are among its priorities. In fact, both the NYPD and the City of New York publicly emphasize the importance of directing resources to combating sex trafficking.⁴⁹ The NYPD receives funding from the federal government specifically for that purpose.⁵⁰ However, what actually happens daily on the ground level undercuts any purported efforts to truly grapple with the issue of trafficking. The importance placed on the pursuit of low-level offenses in current policing strategy works against any efforts to meaningfully investigate and arrest sex traffickers. Instead, it encourages a high volume of arrests for prostitution offenses without regard to the impact of those arrests.

A. *Quality-of-Life Policing & Prostitution Arrests*

For the last twenty years, policing in New York City has been governed by a strategy entitled "Reclaiming the Public Spaces of New York," which amounts to "a full-scale initiative at the precinct level to eliminate quality-of-life offenses."⁵¹ Immediately upon implementation of this strategy, misdemeanor arrests jumped more than 50% in New York City, and have continued on a steady rise.⁵² Prostitution is an integral part of the NYPD's public order policing, and every so often a new "Operation" or frenzied approach is un-

⁴⁹ See, e.g., Press Release, The City of New York, Office of the Mayor, "Deputy Mayor for Legal Affairs Carol Robles-Roman Announces Second Phase of New York City's Multi-Media Campaign to Combat Human Trafficking in Observance of National Crime Victims' Rights Week," Apr. 12, 2011, available at http://www.nyc.gov/html/endht/downloads/pdf/dm_robles.pdf; Testimony of NYPD Inspector James Capaldo, before the New York City Council (Oct. 19, 2011) (on file with the City University of New York Law Review) [hereinafter Capaldo Testimony]; Nayaba Arinde, *Missing*, N.Y. AMSTERDAM NEWS, Aug. 6, 2009, at 1.

⁵⁰ Capaldo Testimony, *supra* note 49, at 3.

⁵¹ William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality of Life Crimes*, 3 J.L. & POL'Y 447, 451 (1995).

⁵² From 1993 to 1998, the total number of adult misdemeanor arrests increased by 66.3%, from 129,404 to 215,158. Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1160 n.7 (2004). The most recent statistics available show 249,211 misdemeanor arrests citywide in 2011. N.Y. ST. DIV. OF CRIM. JUST. SERV., COMPUTERIZED CRIMINAL HISTORY SYSTEM, ADULT ARRESTS 2002-2011 (Feb. 21, 2012), available at <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/NewYorkCity.pdf>.

veiled as law enforcement's latest weapon in prostitution arrests.⁵³

This is compounded by the constant pressure among NYPD officers to make unofficial arrest quotas, both to satisfy precinct commanders and to justify overtime.⁵⁴ Although the NYPD has always expressly denied the existence of an arrest quota system, recent investigations have confirmed that such systems do exist, and that they clearly impact the manner in which NYPD officers view arrests and their related investigatory duties.⁵⁵

All of these factors together create a policing environment in which a steady flow of low-level arrests are incentivized because officers are encouraged to keep arrests uncomplicated, process them, and go out and make more. In Manhattan, the officers making prostitution arrests are not even required to speak to a prosecutor after making the arrest before the case is sent to criminal court. Unlike other types of crimes, where an officer either speaks to or meets with a prosecutor as part of the arrest process, these arrests proceed entirely by affidavit, meaning an officer merely has to check off boxes on a pre-printed form to complete the processing of a prostitution arrest. This ensures that there is no oversight, no screening, and no debriefing of prostitution arrests that could potentially lead to identification and investigation of sex trafficking. Furthermore, this high volume of arrests comes at a tremendous cost to the City, the court system, and taxpayers in general.⁵⁶

⁵³ See, e.g., Michelle McPhee, *Hooker Alert in Times Square: Cops in New Push to Rout Prostitutes and Drug Dealers*, N.Y. DAILY NEWS, May 4, 2002, at 6 (describing the NYPD's "Operation Neon Light," a "new quality-of-life initiative" unveiled to target prostitution and other low-level offenses); John Marzulli, *New War on Public Pests, Commish Focuses on Quality of Life*, N.Y. DAILY NEWS, Jan. 9, 2002, at 3 (describing another targeted operation called "Operation Clean Sweep").

⁵⁴ See, e.g., Joseph Goldstein & Christine Haughney, *Bad Manners Then, Cause for Arrest Now*, N.Y. TIMES, Jan. 7, 2012, at A17.

⁵⁵ See, e.g., M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing As a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 395 n.108 (2011) (noting how a series of newspaper articles from the *Village Voice* based on audio recordings of two NYPD officers from Brooklyn and the Bronx exposed a quota system where officers were threatened with discipline for failing to make sufficient arrests); Graham Rayman, *The NYPD Tapes Confirmed*, VILLAGE VOICE (Mar. 7, 2012), available at <http://www.villagevoice.com/2012-03-07/news/the-nypd-tapes-confirmed/> (reporting that the NYPD confirmed the allegations from the audio recordings that precinct commanders encouraged arrests quotas); Rocco Parascandola & Rich Schapiro, *Cop Claims Quotas Rule in 42nd Precinct*, N.Y. DAILY NEWS (Feb. 23, 2012), available at http://articles.nydailynews.com/2012-02-23/news/31093008_1_cop-claims-quotas-42nd-precinct (discussing how officers in the 42nd Precinct who failed to meet arrest quotas were given undesirable assignments and not allowed to work overtime).

⁵⁶ See, e.g., Goldstein & Haughney, *supra* note 54.

B. Lack of Training Among Law Enforcement

Finally, one of the biggest obstacles to meaningful prevention and prosecution of sex trafficking in New York City is a lack of mandatory training for all NYPD officers. While the NYPD has a dedicated unit within its Major Case Squad that investigates cases of sex trafficking citywide, the majority of prostitution arrests are not made by this unit. Instead, VICE squads, anti-crime units, cabaret units, conditions units, and others unfamiliar with the reality of sex trafficking make the majority of arrests for prostitution activity citywide.⁵⁷

While these officers could potentially be the eyes and ears in the ongoing effort to deal with sex trafficking, the majority has not received any specialized training on sex trafficking. Indeed, an officer from the Midtown South Precinct, responsible for more than 250 prostitution arrests in his career, testified in court recently that he had received no training on sex trafficking from the NYPD. Despite having arrested a seventeen year-old girl for prostitution, the officer, a ten-year veteran of the force, could not define sex trafficking. He was unaware that New York had an anti-trafficking law, and had never even been trained on the risk of commercial sexual exploitation of minors.⁵⁸

Without a trained police force, sensitive to the risk of exploitation and trafficking that many involved in prostitution face, New York City's arrest policy will continue to mistake victim for offender. The NYPD must be held accountable in this regard. There must be oversight as to what specific training is conducted on sex trafficking for all members of the department, and a closer monitoring of prostitution arrest policy.

⁵⁷ See, e.g., Transcript of Record at 5, *People v. S.M.*, 2011CN003797 (N.Y. Co. Crim. Ct., Jun. 14, 2011) (testimony of NYPD Officer Jeffrey Rohe from the Midtown North Precinct responsible for over 200 prostitution arrests in his career) (on file with City University of New York Law Review); Transcript of Record at 35–36, *People v. J.W.*, 2010NY069272 (N.Y. Co. Crim. Ct., Nov. 23, 2010) (testimony of NYPD Officer Thomas Nuzio from the 6th Precinct prostitution conditions unit responsible for over 100 prostitution arrests in his career) (on file with City University of New York Law Review); Transcript of Record at 34–35, *People v. T.S.*, 2010NY007515 (N.Y. Co. Crim. Ct., July 13, 2010) (testimony of NYPD Officer Lindsay Agard from the 6th Precinct prostitution conditions unit responsible for over 100 prostitution arrests in her career) (on file with City University of New York Law Review).

⁵⁸ Transcript of Record at 23, *People v. I.G.*, 2011CN004514 (N.Y. Co. Crim. Ct., Jun. 21, 2011) (testimony of NYPD Officer Keith Stylianos confirming that he had received no training on sex trafficking from the NYPD) (on file with City University of New York Law Review).

CONCLUSION

Current arrest and prosecution policies in New York City cast too wide of a net, ensnare victims, and undermine the intent of New York and federal anti-trafficking law. The failure to adequately investigate whether those arrested are in fact victims of exploitation and trafficking has a devastating impact. Fear of law enforcement instilled in victims by traffickers is reaffirmed by unjust arrests. Prosecutions victimize them further. New York City needs to adjust its priority on low-level offenses to encourage investigation and include a sensitive and thorough treatment of prostitution arrests. Such a policy would be more fiscally responsible, as needed dollars could be reallocated to serve those in need. Ultimately, human costs would be reduced.

In order to truly prevent the criminalization of trafficking victims in our criminal justice system, there must be a significant shift in police and prosecutorial strategy, including specific training for law enforcement, a reevaluation of current arrest and prosecution policies and the dedication of specific and sufficient resources. Public defenders cannot be expected to fight this battle, and undo this considerable damage, on their own.

